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[B-138942(1)]

Travel Expenses—Air Travel—Fly America Act—Employees' Liability—Travel by Noncertificated Air Carriers

Employee's liability under 49 U.S.C. 1517 and the Fly America guidelines should be determined on the basis of loss of revenues by certificated U.S. air carriers as a result of the employee's improper use of, or indirect travel by, noncertificated air carriers. To the extent that State Department's formu'as at 6 FAM 134.5 impose liability based on gain in revenues by "unauthorized" carriers where traveler's actions merely shift Government revenues between noncertified air carriers, those formulas unnecessarily penalize Government travelers.

Mileage—Proration Formula—Air Travel in Violation of Fly America Guidelines

In the absence of agency instructions adopting a fare proration formula for determining traveler's liability for scheduling of travel in violation of the Fly America guidelines, this Office will app'y a mileage proration formula calculating the traveler's liability based on certificated U.S. air carriers' loss of revenues.

Travel Expenses—Air Travel—Fly America Act—Rest and Recuperation—Primary Point

Under State Department instructions, alternate rest and recuperation (R&R) point is to be regarded as the employee's primary R&R point for purposes of 49 U.S.C. 1517. Since certificated U.S. air carrier service is unavailable between the employee's duty station, Kinshasa, and his alternate R&R point, Amsterdam, employee's action in extending his ticket to include personal round-trip travel aboard a foreign air carrier to Los Angeles at a reduced through fare was not improper since his additional travel did not diminish receipt of Government revenues by certificated U.S. air carriers.

Travel Expenses—Air Travel—Fly America Act—Rest and Recuperation—Alternate Point

In view of State Department's instruction that alternate R&R point is to be regarded as employee's primary R&R point for purposes of 49 U.S.C. 1517 and application of the Fly America guidelines, employee's choice of alternate R&R location not serviced by certificated U.S. air carriers will be scrutinized to assure that it meets the purpose of rest and recuperation and was not selected for the purpose of avoiding the requirement for use of certificated U.S. air carriers.

In the matter of Arthur R. Thompson—Fly America Act: liability formula; rest and recuperation, January 3, 1977:

This decision concerns the transportation expense entitlement under section 5 of the International Air Transportation Fair Competitive Practices Act, 49 U.S.C. § 1517, of Mr. Arthur R. Thompson in connection with rest and recuperation (R&R) travel performed aboard foreign air carriers. Until his separation in the spring of 1976, Mr. Thompson was stationed in Kinshasa, Republic of Zaire, as an employee of the Agency for International Development. In connection with his R&R travel, Mr. Thompson was authorized round-trip economy air fare from Kinshasa to Rome, in the amount of $1,153.60. Amsterdam was ultimately designated his alternate R&R point in ac-

cordance with 3 FAM 698.8–3. The round trip segment air fare from Kinshasa to Amsterdam is $1,241.60.

Prior to his departure on December 2, 1975, Mr. Thompson submitted the following itinerary:

December	2 Tues	LV Kinshasa	20:40	KLM
	3 Wed	AR Amsterdam	6:30	
	10 Wed	LV Amsterdam	15:55	LH
	10 Wed	AR Los Angeles	18:35	
January	4 Sun	LV Los Angeles	20:45	LH
	5 Mon	AR Amsterdam	16:45	
	5 Mon	LV Amsterdam	22:30	KLM
	6 Tues	AR Kinshasa	8:25	

Having received a cash advance for the $1,153.60 amount of his air fare payable by the Government, Mr. Thompson purchased an excursion ticket on a foreign air carrier for round-trip travel from Kinshasa via Amsterdam to Los Angeles and return at a cost of $1,289.60. Thus, for the amount of $48 ($1,289.60–$1,241.60) in addition to the fare for round-trip travel between Kinshasa and Amsterdam, the employee was able to travel from Amsterdam to Los Angeles and back, whereas the segment fare for round-trip travel between those two points is $842.84. No American carrier was available for travel between Kinshasa and Amsterdam, but American carrier was available between Amsterdam and Los Angeles. In view of the fact that the round-trip air fare between Kinshasa and Rome payable by the Government subsidized the employee's additional personal travel, the issue is whether Mr. Thompson violated the Fly America guidelines, B–138942, March 12, 1976, by traveling round trip between Amsterdam and Los Angeles aboard a foreign air carrier.

State Department's instruction regarding application of the Fly America guidelines to rest and recuperation travel is set forth in its Airgram, Message Reference No. A–7187, as follows:

> When an American carrier provides service between the post and the designated R&R point, the traveler is expected to schedule his/her departure to make use of such carrier. If, as sometimes occurs, an individual chooses an alternative R&R point, this location is treated as if it were the primary R&R point insofar as use of American-flag carriers is concerned.
>
> Thus, a traveler who could have gone to the designated R&R point using American-flag carriers might choose an alternative R&R point where American carriers may be used only for part of the trip or not at all. This would be permissible under the regulation, but is certainly not encouraged. In the converse situation, where the post and the primary R&R location are not connected by American flag service but the post and the alternate R&R location are, it is mandatory for the traveler to use the American carrier for travel to the alternate R&R point, if that location is selected. Stated another way, there is no "credit" for the amount of foreign airline travel which would have occurred in going to the normal R&R location and there is likewise no "penalty" for a lesser amount of American flag use in travel to an alternate R&R point.

In accordance with this instruction, the alternate R&R point is to be regarded as the primary R&R point for purposes of compliance with the Fly America guidelines.

There is no certificated U.S. air carrier service available between Kinshasa and Amsterdam. For this reason, Mr. Thompson properly traveled by foreign air carrier between his duty station and alternate R&R point. The question thus posed is the effect of his personal travel to Los Angeles.

The circumstances of Mr. Thompson's travel to Los Angeles would appear to be similar to the situation considered in Airgram Example No. 3. That example, involving the employee's extension of his ticket past post of assignment, is as follows:

Travel is authorized from Washington to post but the traveler elects to purchase a through ticket to another point past his post of assignment.

Through fare from Washington to post	$800
Through fare from Washington to more distant point	$825
Actual travel:	
U.S. flag from Washington to rest stop	$504
Foreign flag (only avail) from rest stop to post	479
Foreign flag from post to point of extension	225
TOTAL of segment fares	$1208

Traveler wou'd be liable for: $25 when he received his ticket, Plus:
On his voucher
225/1208 or .19×825=$156.75−$25 (paid above)=$131.75

Application of the above method of computation to Mr. Thompson's travel situation would result in a liability assessment against the employee of approximately $380 for use of foreign carriers.

This result points out a very basic problem with State Department's liability provisions published at 6 FAM 134.5 and amplified in the Airgram referred to above. In certain cases, application of these formulas impose liability on the traveler based on a shift of Government revenues between noncertificated air carriers, whereas the concern that prompted enactment of section 5 of the Fly America Act was the loss of revenues by certificated U.S. air carriers. Given the nonavailability of certificated U.S. air carrier service between Kinshasa and Amsterdam, certificated U.S. air carriers would have received no Government revenues if Mr. Thompson had limited his trip to round-trip travel between his duty station and authorized alternate R&R point. Therefore, extension of his ticket to include personal travel to and from Los Angeles aboard another foreign air carrier did not reduce certificated U.S. air carriers' receipts from Government revenues. Under the particular circumstances, there is no legal basis for the assessment of a penalty against Mr. Thompson for extension of his ticket to include personal round-trip travel aboard a foreign air carrier between Amsterdam and Los Angeles.

We feel it appropriate to note that Mr. Thompson in fact remained in Amsterdam for 1 week before departing for Los Angeles. Under these circumstances, we do not dispute his agency's designation of Amsterdam as his alternate R&R point. If Mr. Thompson had instead traveled to Amsterdam for the sole purpose of obtaining a connecting flight to Los Angeles, or if the tenure of his stay in Amsterdam had been so brief that the purpose of R&R travel could not have been met, we would be required to find that Los Angeles was in fact his alternate R&R point. Were this so Mr. Thompson's travel via Amsterdam aboard foreign carriers would have been improper since certificated U.S. air carriers are in fact available over a usually traveled route between Kinshasa and Los Angeles.

Where it appears that the designation of a specific location as the alternate R&R point is made for the purpose of avoiding use of certificated U.S. air carriers and where the employee's travel to that location does not meet the purpose of rest and recuperation, the traveler's liability for misuse of foreign air carriers will be determined on the basis of travel to the location at which he spends a significant amount of time for rest and recuperation purposes.

We believe State Department's liability formulas warrant further comment. The basic formulas are set forth in 6 FAM 134.5 as follows:

134.5 *Personal Financial Responsibility for Unauthorized Use of Foreign Airlines*

Where no acceptable justification exists for using a foreign-flag airline over all or a part of the authorized route, or where a lesser amount of American-flag travel occurs because of indirect or interrupted travel for personal convenience, the additional amount of foreign-flag travel is not payable by the Government, but is for the personal account of the traveler.

Where a direct through-fare involves both authorized segments on American or foreign carriers and unauthorized segments on foreign carriers, the traveler's share will be calculated using the ratio of the unauthorized segment fare to the total segment fare applied to the authorized through-fare.

Example 1 Direct travel

Through-fare between authorized points of origin and destination equals $1000. Traveler elects to stop over and take a foreign-flag airline from an intermediate point where this is not authorized. The segment fare to the stopover point is $700 and the segment fare on the foreign carrier is $500. Accordingly, the traveler would be responsible for $\frac{5}{12}$ of the through-fare or $416.67. ($700+$500=$1200; $500/$1200=5/12; 5/12×$1000=$416.67).

When an indirect through-fare includes both authorized segments on American and foreign carriers and unauthorized segments on foreign carriers, the traveler's share will be the difference between the direct through-fare and the indirect through-fare plus the difference between the direct through-fare and the segment fare(s) performed on authorized carriers. If the indirect segment fare(s) on American carriers or authorized foreign carriers/equals or exceeds the cost of the direct through-fare, the travelers responsibility will be limited to the difference between the direct through-fare and the indirect through-fare.

Example 2 Indirect travel

Through-fare between authorized points on a direct route is $1000. The traveler elects to travel on an indirect route which has a through-fare of $1400. Part of this indirect travel is by authorized carriers ($800 segment fare) and part is by unauthorized foreign carriers ($700 segment fare). The traveler would

be responsible for paying the difference between the through-fares $1400—$1000=$400 plus the difference between the authorized through-fare and the amount of travel performed on authorized carriers $1000—$800=$200 for a total of $600.

For the direct travel situation, State adopts a fare proration formula measuring gain in revenues by "unauthorized" foreign carriers. In the indirect travel situation, the fare proration method is abandoned in favor of a calculation that assumes certificated U.S. air carriers receive revenues equal to the segment fares for segments flown aboard certificated U.S. air carriers. Based on this assumption, the indirect travel formula attempts to measure loss of Government revenues by certificated U.S. carriers. The confusion that results from use of these different formulas is apparent from a consideration of Airgram Example No. 3, quoted above. That example, involving extension of the employee's ticket past his post of assignment, is no different in principle than the indirect travel situation. Yet, in that example, State applies its fare proration formula applicable to direct travel.

With respect to State's direct travel example, we have no objection to the use of a fare proration method of determining liability. Proration of the through fare based on the individual segment fares, or on a mileage basis, gives recognition to the fact that participating carriers generally receive an amount less than the individual segment fares and constitutes a reasonable attempt to determine that lesser amount. Generally, the through fare (total charge for air travel over two or more route segments) is less than the sum of the individual segment fares. The individual segment fares are ascertainable. However, the distribution of through fare revenues as between participating air carriers is a contractual matter between those carriers and, while some agreements are required to be filed with the Civil Aeronautics Board, they are not readily available for use by other departments and agencies of the Federal Government. In short, there is no practicable way for travelers or disbursing or certifying officers to determine how much of a through fare the individual participating air carriers actually receive.

Notwithstanding the appropriateness of a proration approach, we believe that the particular formula adopted by State for direct travel may unduly penalize travelers. As discussed in conjunction with Mr. Thompson's case, the formula would impose a penalty based on the employee's improper or indirect scheduling on one noncertificated air carrier as opposed to proper or direct scheduling aboard another noncertificated air carrier. While Congress intended that Government revenues not benefit noncertificated air carriers where certificated U.S. air carrier service is available, we find no intent to restrict ex-

penditures of Government revenues where the employee's improper or indirect use of a noncertificated air carrier merely transfers Government revenues to that carrier from another noncertificated air carrier. We find nothing in the Act or its legislative history to suggest any obligation on the part of the Government to protect the income of one class of noncertificated air carriers as opposed to another class of noncertificated air carriers.

State's liability formula for indirect travel purports to measure loss of revenues by certificated U.S. air carriers as a result of the employee's improper or indirect scheduling aboard noncertificated air carriers. In view of the purpose behind the Fly America provisions, we believe that loss of revenues by certificated U.S. air carriers, rather than gain in revenues by noncertificated air carriers, is the appropriate measure of the traveler's liability for improper or indirect use of noncertificated air carrier service. However, we believe State's specific formula for determining liability in the indirect travel situation fails to take into account the fact that certificated U.S. air carriers generally receive less than the full segment fares when the ticket involves a through fare or total charge for air travel over two or more route segments.

In lieu of State's formulas, we suggest a single proration formula for all situations measuring loss of revenues by certificated U.S. air carriers as the result of the employee's improper or indirect use of noncertificated air carrier service. The following formula, using fare proration, compares certificated U.S. air carrier revenues earned as a result of the employee's indirect or improper travel with the Government revenues certificated U.S. air carriers would have earned if the employee had traveled as authorized on official business and in accordance with the Fly America guidelines. It results in a penalty against the employee only where his actions cause certificated U.S. air carriers to suffer a loss of revenues:

$$\frac{\text{Sum of certificated carrier segment fares, authorized}}{\text{Sum of all segment fares, authorized}} \times \text{Fare payable by Government}$$

MINUS

$$\frac{\text{Sum of certificated carrier segment fares, traveled}}{\text{Sum of all segment fares, traveled}} \times \text{Through fare paid}$$

The traveler is liable only if the difference is greater than zero.

Applying this formula to Airgram Example No. 3, discussed above, the calculation of liability is as follows:

Authorized travel

Through fare Washington to post	$800
Segment fares:	
U.S. flag, Washington to rest stop	$504
Foreign flag (only avail.) rest stop to post	479
	$983

Actual travel

Through fare Washington to more distant point	$825
Segment fares:	
U.S. flag, Washington to rest stop	$504
Foreign flag (only avail.) rest stop to post	479
Foreign flag post to more distant point	225
	$1208

Calculation:

$$(504/983 \times \$800) - (504/1208 \times \$825) = \$410.17 - \$344.20 = \$65.97$$

Since certificated U.S. carriers lost revenues of $65.97, that amount should be deducted from the travel voucher or recovered from the employee, as appropriate. Note that in addition the employee is personally responsible for payment to the air carrier of the $25 amount by which the extended or indirect through fare exceeds the authorized fare payable by the Government.

As indicated above, we find no basis for legal objection to State's use of a fare proration method for determining personal financial responsibility for improper travel aboard noncertificated air carriers. However, this method is administratively cumbersome since it requires a determination of the various segment fares and through fares in effect on the date travel was performed. The fares fluctuate and may be stated in terms of foreign currency, requiring a determination of the currency exchange rate in effect on that date and conversion to a dollar amount. We believe that the administrative costs involved could be substanially reduced by the use of a mileage proration formula since segment distances remain constant and can be ascertained from the Official Airline Guide. In the absence of administrative regulations adopting a fare

proration formula for determining liability, this Office will apply the following mileage proration formula:

$$\frac{\text{Sum of certificated carrier segment mileage, authorized}}{\text{Sum of all segment mileage, authorized}} \times \text{Fare payable by Government}$$

MINUS

$$\frac{\text{Sum of certificated carrier segment mileage, traveled}}{\text{Sum of all segment mileage, traveled}} \times \text{Through fare paid}$$

The traveler is liable only if the difference is greater than zero, and in no case is liable for an amount in excess of the segment fare payable for the segment improperly traveled.

[B-138942(2)]

Subsistence—Per Diem—Overseas Employees—Delays—Use of Certificated Air Carriers

Up to 2 days additional per diem is payable to comply with the requirement of 49 U.S.C. 1517 for use of available certificated air carrier service for foreign air transportation. If total delay, including delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties, involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with use of noncertificated service, certificated service may be considered unavailable.

In the matter of the Fly America Act—additional per diem for delay in travel, January 3, 1977:

The Department of State by letter of August 19, 1976, has requested a decision concerning application of 49 U.S.C. § 1517 and the Comptroller General's Guidelines for Implementation of Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, issued March 12, 1976. Its specific concern is with a possible decrease in the number of certificated air carrier flights departing from Moscow, Russia, for the United States.

We are advised that the only certificated air carrier serving Moscow is Pan American World Airways and that it is State Department's understanding that, as of October 1976, Pan American intended to reduce service from Moscow to one flight per week. To date the airline schedules reflect that Pan American still provides service out of Moscow twice weekly, and we understand that a reduction in service is not presently contemplated. Nevertheless, the problem which State Department poses is present even when certificated service is provided twice a week, and the resolution of that problem is basic to implementation of 49 U.S.C. § 1517.

The State Department points out that requiring an employee to use a certificated air carrier serving Moscow as infrequently as once or twice a week could result in an employee delaying the initiation of his travel for several days beyond the date he is available to travel, or arriving at his temporary duty point several days before he is able to perform the duty for which he was sent. The State Department also points out that to require an employee to travel on his nonworkday would be in conflict with the policy in 5 U.S.C. § 6101(b)(2) of scheduling travel during an employee's regular workweek. In view of the fact that such delay could be costly as well as inefficient, the State Department seeks guidance as to the length of delay permissible to facilitate use of certificated service in compliance with 49 U.S.C. § 1517.

The Comptroller General's guidelines, cited above, require Government-financed commercial foreign air transportation to be performed by certificated air carriers where available. They set forth in paragraph 4 criteria for determining when such service is "unavailable," as follows:

(a) when the traveler, while en route, has to wait 6 hours or more to transfer to a certificated air carrier to proceed to the intended destination, or
(b) when any flight by a certificated air carrier is interrupted by a stop anticipated to be 6 hours or more for refueling, reloading, repairs, etc., and no other flight by a certificated air carrier is available during the 6-hour period, or
(c) when by itself or in combination with other certificated or noncertificated air carriers (if certificated air carriers are "unavailable") it takes 12 or more hours longer from the origin airport to the destination airport to accomplish the agency's mission than would service by a noncertificated air carrier or carriers, or
(d) when the elapsed traveltime on a scheduled flight from origin to destination airports by noncertificated air carrier(s) is 3 hours or less, and service by certificated air carrier(s) would involve twice such scheduled traveltime.

The above-quoted criteria are addressed to air travel en route from origin airport to destination, or elapsed traveltime. The guidelines establish no policy regarding the initiation of travel or the timing of arrival, and provide no guidance in determining the length of time an employee should delay his departure at origin or remain idly at destination before commencing work to facilitate his use of certificated air carrier service. In part, the question of the timing of travel is a matter of travel management for determination by the department or agency involved inasmuch as determinations such as the employee's availability for travel and the urgency of the department's or agency's need for his services are within its knowledge and control. However, the question of how much additional per diem is payable to comply with the guidelines is properly before this Office.

In enacting 49 U.S.C. § 1517, Congress recognized that the requirement to use available U.S. flag certificated air carrier service would involve additional inconvenience as well as additional cost in international air travel. Thus, subparagraph 3(a) of the guidelines provides that certificated air carrier service is considered "available" even

though "comparable or a different kind of service by a noncertificated air carrier costs less." This statement refers to the comparative cost of air fare aboard certificated as opposed to noncertificated carriers and is not directed at costs incurred incident to travel, such as per diem.

The guidelines do, however, recognize that additional per diem expenses will be incurred to effectuate the policy of 49 U.S.C. § 1517. The unavailability criteria set forth at paragraph 4 of the guidelines contemplate delay in en route travel for which per diem may be paid. In fact, subparagraph 4(c) imposes upon travelers a potential delay in travel of up to 12 hours and thereby sanctions payment of up to 12 hours additional per diem to comply with the requirement for use of certificated air carrier service.

Although the unavailability criteria set forth in the guidelines are limited to considerations of delay en route, the concept of availability of certificated service under 49 U.S.C. § 1517 clearly contemplates some delay in the initiation of travel, as well as at destination, for which payment of additional per diem is warranted. We have previously addressed the question of how much delay is warranted to facilitate use of American flag service in the context of Senate Concurrent Resolution 53 dated October 1, 1962. That resolution required travel on official Government business to be performed on American flag air carriers except where travel on other aircraft was essential to the official business concerned or was necessary to avoid unreasonable delay, expense or inconvenience. In B–148906, July 5, 1962, we held that a delay of 48 hours in the initiation of travel to enable the employee to avail himself of American flag service was not unreasonable and that additional per diem expenses occasioned by that delay were payable.

We have recognized that additional per diem costs of up to 48 hours may be paid to effectuate other travel policies. Section 6101(b)(2) of title 5 of the United States Code requires that, to the maximum extent practicable, travel be scheduled within the employee's regularly scheduled workweek. Under that authority we have held that travel may be delayed to permit an employee to travel during his regular duty hours and that payment of up to 2 days additional per diem for that purpose is not unreasonable. 50 Comp. Gen. 674 (1971); 51 *id.* 727 (1972); 53 *id.* 882 (1974).

Giving consideration to collateral delay costs such as per diem and salary and to the fact that such costs, unlike costs of air fare, do not confer a direct benefit on certificated air carriers, we believe that the additional per diem payable in furtherance of 49 U.S.C. § 1517 normally should be limited to 48 hours. If the total delay to facilitate use of certificated service involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with the use of noncertificated service, certificated service may be con-

sidered unavailable. The 48 hours include delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties.

The usual travel situation will not involve delay both at point of origin and point of destination. Since per diem is not payable at the employee's permanent duty station, there will be no cost associated with delay in initiating travel where the employee's point of departure is his permanent duty station. In general, delay in initiation of travel will be involved only where the employee, upon completing his assignment at a temporary duty location, is available for further or return travel. By the same token, since the traveler's per diem entitlement terminates upon return to his permanent duty station, no delay cost at destination will be involved where that destination is the employee's regular duty station. Such delay may occur where the employee's temporary duty assignment at destination involves the performance of work in accordance with a nonflexible schedule. In most cases, however, some flexibility will exist in timing the employee's performance of his assignment at destination and, in those cases, it is expected that the traveler's duties will be scheduled to minimize delay. Delay both at origin and destination is anticipated only where the employee is traveling between two temporary duty points, at both of which he is subject to an inflexible work schedule.

State Department has recommended a certification process whereby the traveler will be furnished by his department or agency with a certification as to the time and date of his availability to begin travel. We believe that such a certification procedure, both as to the employee's availability for travel and the scheduling of work at destination, would permit a determination of the additional per diem costs involved and would facilitate the proper scheduling of travel in accordance with 49 U.S.C. § 1517.

[B–138942(3)]

Officers and Employees—Traveltime—Hours of Travel—Sleeping Time

Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable.

Officers and Employees—Traveltime—Hours of Travel—Regular *v.* Nonduty Hours

The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101

(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier.

In the matter of the Fly America Act—hours of travel, January 3, 1977:

This decision is rendered to amplify the Comptroller General's "Guidelines for Implementation of Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974," issued March 12, 1976, B-138942.

The guidelines require Government-financed commercial foreign air transportation to be performed by U.S. flag certificated air carriers where such service is available, and they set forth explicit criteria for determining when such service is available. It has been pointed out that the guidelines do not address the question of selection between flight schedules where certificated service otherwise available requires travel during off duty or unreasonable hours.

By way of specific example, we are given the actual itinerary of an employee who, in the course of his travel between various South American countries, traveled from Caracas, Venezuela, to Rio de Janeiro, Brazil. In order to use American flag service, the employee was required to depart Caracas at 12:25 a.m. on Saturday morning aboard a Pan American flight scheduled to arrive at Rio de Janeiro at 7:05 a.m. We are advised that Pan American is the only certificated air carrier providing service between Caracas and Rio de Janeiro and that the four Pan American flights scheduled each week require substantial travel between the hours of midnight and 6 a.m.

Based on these circumstances, we are asked whether due consideration to the requirements of 49 U.S.C. § 1517, as implemented by the guidelines, requires the traveler to schedule his travel during late night and early morning hours.

It has long been a basic consideration in scheduling travel that employees not be required to travel during periods normally used for sleep. In general, the question of when travel should be performed arises in conjunction with the issue of per diem entitlement. In that context we have held that the amount of per diem to which an employee is entitled is not to be determined on the constructive basis of commercial carrier service available at 4:15 a.m. when a more reasonable schedule is available. 16 Comp. Gen. 620 (1936). See also B-149868, October 2, 1962, wherein we recognized that an employee could be required to travel by a train scheduled to arrive at destination at 10 p.m. inasmuch as such scheduling enabled the employee to obtain proper rest.

The basic concern for the employee's health is reflected in the following provision at Joint Travel Regulation (JTR) Vol. 2, para. C4465-2, applicable to civilian employees of the Department of Defense, which provides in pertinent part that:

> * * * Normally an employee on official travel will not be required to travel during unreasonable hours at night if sleeping accommodations are not available on the mode of transportation. An employee will not be expected to use a carrier the schedule of which requires boarding or leaving the carrier between 2400 hours and 0600 hours if there are more reasonable, earlier or later departure or arrival scheduled times that will meet mission requirements.

Paragraph M4202-3(a) of the JTR Vol. 1 similarly provides that military members will not normally be expected to select a schedule that requires departure or arrival between 12 midnight and 6 a.m. B-177897, March 21, 1973; B-164709, November 28, 1975.

In enacting 49 U.S.C. § 1517, Congress recognized that the requirement to use available certificated air carrier service would involve additional inconvenience as well as cost in international travel. That fact is reflected in paragraph 3 of the guidelines issued March 12, 1976, B-138942, which provides in part that neither considerations of cost nor convenience will be regarded as rendering certificated air carrier service unavailable, as well as in the unavailability criteria of paragraph 4 which impose upon travelers the burden of remaining in a travel status for up to an additional 12 hours to facilitate the use of certificated service.

We believe, however, that the requirement for reasonable periods of rest during hours normally allocated to sleep is more than a matter of mere convenience to the traveler. While Congress intended that travelers use certificated carriers whenever and wherever possible, we do not believe that it was intended that such service be used at the expense of jeopardizing the employee's health and efficiency. For this reason we believe that the standards set forth in JTR, Vol. 2, para. C4465-2, quoted above, may appropriately be applied in determining whether certificated air carrier service is available. In the example given, the employee would not be required to use any of the four Pan American flights departing Caracas around midnight and arriving in Rio de Janeiro in the early morning hours if less onerous scheduling is available aboard a foreign air carrier. Where the only certificated air carrier service available requires travel during periods normally used for sleep, and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable.

The above rule regarding travel during hours normally allocated to sleep is distinct from the Government's policy on scheduling of travel reflected at 5 U.S.C. § 6101(b)(2):

> (2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

In considering the question of the hours during which travel is to be scheduled in order to comply with 49 U.S.C. § 1517, we feel it is appropriate to comment on the effect of 5 U.S.C. § 6101(b)(2) as it pertains to the requirement to use available certificated air carrier service.

While Congress clearly intended that as a general practice travel should not be scheduled at times outside the employee's regularly scheduled workweek, it left to the discretion of the employing agency authority to determine when it is impracticable to schedule official travel within the scheduled workweek of an employee under 5 U.S.C. § 6101(b)(2). 51 Comp. Gen. 727 (1972). Thus, in B-167580, August 21, 1969, we held that since the term "practicable" appearing in 5 U.S.C. § 6101(b)(2) is not defined, each case is to be treated on the basis of the particular facts involved, including considerations such as the agency's workload and the scheduling of the event necessitating the travel.

The strong Government policy reflected in 49 U.S.C. § 1517 requiring the use of available certificated air carrier service is a factor to be considered in determining the practicability of scheduling travel during the employee's regular duty hours. Where a choice of certificated air carriers is available, one which would permit the employee to travel during regular duty hours and one which would not, the travel should be scheduled during regular duty hours to the extent otherwise feasible. However, where the only certificated service available would require the employee to travel during off-duty hours, but not during hours normally allocated to sleep, the employee would be required to use that certificated service as opposed to traveling by a noncertificated carrier. To hold otherwise would largely defeat the purpose of 49 U.S.C. § 1517.

In addition to the above question concerning the scheduling of travel, we have been asked whether an employee who is required to travel at inconvenient off-duty hours should be granted compensatory time off.

With respect to General Schedule employees exempt from the Fair Labor Standards Act (FLSA), the authority for granting compensatory time off is contained at 5 U.S.C. § 5543. That section provides for the granting of time off in lieu of payment of an equal amount of time spent in irregular or occasional overtime. Compensatory time off may thus be granted only if the time spent in a travel status is compensable as overtime hours of work. Under 5 U.S.C. § 5542(b)(2), time spent in a travel status away from the employee's duty station is not compensable as overtime hours of work unless:

(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

Each case is to be considered based on the particular circumstances of travel involved and, if those circumstances meet the requirements of 5 U.S.C. § 5542(b)(2), compensatory time off may be granted consistent with the provision therefor at 5 U.S.C. § 5543.

There is no authority for granting compensatory time off in lieu of overtime pay to wage board employees, although 5 U.S.C. § 5544 contains authority for payment of overtime compensation for travel-time identical to that of 5 U.S.C. § 5542(b)(2)(B), quoted above. With respect to the entitlement of nonexempt employees to overtime compensation for time spent in a travel status, see FPM Letter 551–10, April 30, 1976.

[B–187129]

Subsistence—Per Diem—Temporary Duty—At Place of Family Residence

Employee who stayed at family residence while performing temporary duty may not be reimbursed lodging expenses based on average mortgage, utility, and maintenance expenses because such expenses are costs of acquisition of private property and are not incurred by reason of official travel or in addition to travel expenses. 35 Comp. Gen. 554, and other prior decisions, should no longer be followed.

In the matter of Sanford O. Silver—temporary lodging at family residence, January 4, 1977:

This action is in response to a request dated August 3, 1976, from Ms. Orris C. Huet, an authorized certifying officer of the Department of Agriculture, for a decision concerning a voucher submitted by Mr. Sanford O. Silver for per diem in lieu of actual subsistence while on a a temporary duty assignment.

The record indicates that Mr. Silver, a Forest Service employee, was transferred from Atlanta, Georgia, to Washington, D.C., on October 14, 1975. His family, however, remained in Atlanta until March 1976. From January 5, 1976, through January 11, 1976, Mr. Silver was assigned to temporary duty in Atlanta, Georgia. During this period, he lodged at his family's residence in Atlanta. While the voucher shows that Mr. Silver spent 7 days with his family in Atlanta, he is claiming per diem in the amount of $104.50, based on estimated lodging costs of $19 per day for 5½ days. The claimant calculated lodging expenses on the basis of the daily average of his monthly mortgage, utility, and maintenance costs. He arrived at a lodging cost of $18.66 a day, which was rounded to $19 per day.

The certifying officer states that although the regulations do not specifically prohibit the payment of per diem to an employee who

temporarily obtains lodging at his family's residence, as long as it is not the residence from which he commutes daily to his official station, it is her opinion that the lodgings-plus system of computing per diem is inappropriate when an employee uses his residence for lodging. She believes that since a specific per diem rate, as provided by Federal Travel Regulations (FPMR 101–7) paragraph 1–7.3c (May 1973), was not established in advance of the trip, Mr. Silver is not entitled to further reimbursement. We agree for the reasons set forth below.

This question was addressed at 35 Comp. Gen. 554 (1956), wherein we considered the entitlement to per diem of an employee who had been transferred from Washington, D.C., to Philadelphia, but whose family continued to reside in Washington. The employee rented a residence in Philadelphia, from which he regularly commuted to his headquarters. While on temporary duty near Washington, D.C., the employee lodged with his family. We stated in that decision that the payment of per diem while on temporary duty was not legally objectionable because the employee stayed at a residence from which he did not regularly commute to his headquarters. Similar results were reached in our decisions of B–174428, April 17, 1972; B–174722, January 20, 1972; B–165733, January 23, 1969; B–152216, August 20, 1963; B–127828, May 22, 1956.

Our decision in 35 Comp. Gen. 554, *supra*, and in those which followed it, was based upon paragraph 6.2 of the Standardized Government Travel Regulations (March 1, 1965), which provided:

> a. The per diem allowances provided in these regulations represent the maximum allowable. It is the responsibility of each department and agency to authorize only such per diem allowances as are justified by the circumstances affecting the travel. To this end, care should be exercised to prevent the fixing of per diem rates in excess of those required to meet the necessary authorized subsistence expenses.

Under this regulation, which provided for "flat rate" per diem allowances, the employing agency was granted administrative discretion to determine whether and in what amount per diem would be authorized on behalf of an employee who lodged at his residence while on temporary duty. That paragraph has subsequently been superseded by regulations creating a "lodgings-plus" system of computing allowable per diem. As explained below, by reason of the institution of the lodgings-plus system, our decisions in 35 Comp. Gen. 554, *supra*, and its progeny should no longer be followed with respect to travel occurring after October 10, 1971, the effective date of the "lodgings-plus" amendments.

Section 5702 of title 5, United States Code, as amended by Public Law 94–22, May 19, 1975, provides that under regulations prescribed by the Administrator of General Services, employees traveling on offi-

cial business inside the continental United States are entitled to a per diem allowance at a rate not to exceed $35. Implementing regulations appear in the Federal Travel Regulations (FPMR 101–7), FTR para. 1–7.3c(1), as amended effective May 19, 1975, which provides that per diem shall be established on the amount the traveler pays for lodging, plus a $14 allowance for meals and miscellaneous expenses. FTR para. 1–7.3c(1)(a) requires that in computing per diem allowances, there should be excluded from the computation the nights the employee spends at his residence or official duty station. More specifically, FTR para. 1–7.3c(2) (May 19, 1975) requires that the traveler actually incur expenses for lodging before allowing such an allowance, and provides as follows:

2. No minimum allowance is authorized for lodging since those allowances are based on actual lodging costs. Receipts for lodging costs may be required at the discretion of each agency; however, employees are required to certify on their vouchers that per diem claimed is based on the average cost for lodging while on official travel within the conterminous United States during the period covered by the voucher.

As stated by the Court of Claims in *Bornhoft* v. *United States*, 137 Ct. Cl. 134, 136 (1956):

A subsistence allowance is intended to reimburse a traveler for having to eat in hotels and restaurants, and for having to rent a room * * * while still maintaining * * * his own permanent place of abode. It is supposed to cover the *extra* expenses incident to traveling.

Under the rule set forth in *Bornhoft*, the only lodging expenses incurred by a traveler which may properly be reimbursed are those which are incurred by reason of the travel and are in addition to the usual expenses of maintaining his residence. Here, the claimant maintained a second residence in Atlanta for family reasons. The costs of purchasing and maintaining the residence were incurred by reason of his desire to maintain a second residence, and not by virtue of his travel. The claimant obligated himself to pay these costs independently of and without reference to his travel. In short, his mortgage, and maintenance payments would have been made irrespective of the travel. As such, they are not properly for reimbursement.

Accordingly, Mr. Silver is not entitled to any cost of the lodging at his own residence. B–174983, March 31, 1972. The voucher is returned and may not be paid.

[B–180257]

Contracts—Cancellation—No Longer Feasible—Prior Recommendation Withdrawn—Detective Agencies

Decision of September 23, 1976, 55 Comp. Gen. 1472, holding that contract for guard services at Navy installation violated 5 U.S.C. 3108, is affirmed, notwithstanding subsequent information which revealed that contract was originally awarded to sole proprietor who held private detective license and who formed corporation several months after award. In view of the time element involved,

however, cancellation is no longer feasible. Corporation may be considered for future award if president divests himself of detective license, since corporate charter has been amended to eliminate authority to perform investigative services and corporation has applied for guard service license.

In the matter of the Progressive Security Agency, Inc., reconsideration, January 6, 1977:

By letter of November 10, 1976, the Assistant Secretary of the Navy (Installations & Logistics) asked us to reconsider our decision of September 23, 1976, Matter of Progressive Security Agency, Inc., 55 Comp. Gen. 1472. That decision held that Contract N00140-76-C-6304, effective December 11, 1975, awarded pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970), was in contravention of the so-called Anti-Pinkerton Act, 5 U.S.C. § 3108, which provides:

> An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.

In our initial consideration, we found that Progressive Security Agency, Inc. (PSA), a Massachusetts corporation, was a "detective agency" for purposes of the Act because it was expressly empowered under its corporate charter to perform investigative as well as protective services, and was licensed as a detective agency under a Massachusetts statute which provides separate licenses for detective and protective agencies. We also noted that PSA had explicitly presented itself to the public as a detective agency by virtue of telephone directory advertisements. We concluded that the award to PSA was thus improper, regardless of the character of the services to be performed under the contract. Our interpretation of § 3108 is discussed in some detail in our September 23 decision and need not be repeated here. We further concluded that the contract should be cancelled. Finally, we made recommendations designed to preclude similar problems in the future.

The Navy's November 10 letter submits additional factual material not available during our original consideration and (a) requests that we reconsider our previous conclusion; (b) raises the possibility of another award to PSA upon expiration of the present contract since the matters raised in our first decision "can all be corrected by some formal action"; and (c) seeks modification or elimination of our recommended guidelines for future procurements. These matters will be treated in the order listed.

With respect to our original conclusion, Navy submits the following:

(1) PSA amended its corporate charter on August 1, 1976, to eliminate the authorization to provide investigative services.

(2) The detective license obtained under Mass. G.L. ch. 147, sec. 22-30, was issued to William W. Green (President of PSA) as an individual (sole proprietor) doing business as "Progressive Security Agency," and not to the corporation. Navy states that PSA—the cor-

poration—currently holds no license, but is in the process of applying for a guard service license.

(3) "Previous GAO decisions have allowed correction of corporate charters and licenses after contract award to avoid a violation of the Anti-Pinkerton Act."

(4) Previous General Accounting Office (GAO) decisions "have held that broad purposes in a corporate charter will not suffice to establish a violation of the Anti-Pinkerton Act."

(5) Neither the corporation nor the sole proprietorship have detective licenses in Rhode Island, where the contract is being performed, and whose laws, Navy states, "make no provision for special licenses for guard service or protective companies."

PSA's charter, prior to August 1, 1976, stated the corporation's purpose as follows:

> To provide professional security services to businesses and individuals and organizations and also to provide investigatory services to businesses, individuals, and organizations.

The August 1 amendment substitutes the word "consulting" for the word "investigatory" in the above purpose statement. While the nature of the "consulting" services anticipated by the amendment is not specified, the amendment does remove the authorization to perform investigative services.

Prior decisions of our Office have allowed corrections of corporate charters and licenses after bid opening or the date for receipt of proposals to avoid violations of the Anti-Pinkerton Act. Thus, in B-172587, June 21, 1971, we said that we would not object to the award of a contract to a company which had amended its charter after bid opening to eliminate its investigatory authority. We stated in that decision:

> It is true * * * that the integrity of the formal advertising system ordinarily precludes the amendment of offers subsequent to bid opening. The amendment by IPSA of its Articles of Incorporation after bid opening might be considered an analogous situation. However, the extent to which the statutory restriction in 5 U.S.C. 3108 should be applied today to the furnishing of guard services to the Government is at least not free from doubt. See 44 Comp. Gen. 564, 568-69 (1965). In the circumstances, therefore, we would not be required to object to an award to IPSA.

Award in that case had been postponed pending our decision. See also B-156424, July 22, 1965 (change of state license after bid opening but prior to award); B-161770, November 21, 1967 (charter amendment after issuance of solicitation but 3 days prior to date set for receipt of proposals). In all of these cases the eligibility problem was cured prior to award. But *cf.* B-160538, November 15, 1967, which involved a post-award licensing correction (company had initially applied for the correct license but withdrew its application based on apparent mis-

information). Reviewing the above cases, we believe the correct view is that corrections to charters and licenses may be made prior to award to avoid Anti-Pinkerton Act violations. However, such corrections after award, while perhaps relevant in terms of future procurements, do not, in the absence of compelling circumstances, retroactively expunge ineligibility existing at the time of the award.

Concerning the effect of "broad purposes" in a corporate charter, it has been our position that charter authority must be specific to establish a violation of the Anti-Pinkerton Act. 41 Comp. Gen. 819, 822 (1962). This stems from the recognition that most corporations, whatever their nature, include in their charters an "omnibus" clause ("engage in any lawful act or activity for which corporations may be organized in this state" or similar language). It is sufficient to note in this connection that PSA's charter prior to August 1, 1976, was quite specific.

Next, it is true, as Navy states, that the license involved was issued to William W. Green as an individual "under the title of Progressive Security Agency." The corporation itself thus held no license. Navy, citing 44 Comp. Gen. 564 (1965), suggests that the PSA contract should not be objectionable since the corporation, and sole proprietorship are different legal entities. In 44 Comp. Gen. 564, we refused to "pierce the corporate veil" in a situation where a subsidiary corporation had been formed apparently for the primary if not sole purpose of circumventing the Anti-Pinkerton prohibition. We did, however, note a minimum degree of separation (44 Comp. Gen. at 566), and have raised objections in cases where even that minimum did not appear to exist. B–167723, September 12, 1969.

In the present case, no evidence of separateness in any respect other than name has been presented. To the extent that the corporation may have done or solicited business in Massachusetts, this must have occurred under color of the license issued to the sole proprietorship, since there would appear to be no other legal basis for the corporation's operation or solicitation in Massachusetts.

In any event, the degree of separation between the corporation and the sole proprietorship is, for purposes of the present case, immaterial. Navy's clarification of the sole proprietorship versus the corporation has caused us to realize one fact which had been obscured in our original consideration. The contract was originally awarded, not to the corporation, but to the sole proprietorship, because the corporation did not yet exist. The Articles of Organization for the corporation were signed by Mr. Green as Incorporator on March 29, 1976, and filed with the Secretary of the Commonwealth of Massachusetts on April 1. Indeed, the designation "Inc." appears nowhere in the documentation of the negotiations and award of the contract. The contract was thus awarded to "Progressive Security Agency," the sole proprietorship of

Mr. Green, who held a private detective license. (Our inquiry revealed that license P–215 was a renewal and that a similar license was held at the time of award.)

Finally, Rhode Island law does not require the licensing of protective agencies and requires only a limited licensing of private detectives ("for the detection, prevention, and punishment of crime"). General Laws of Rhode Island, title 5, sec. 5-5-1. The acquisition of a certificate of authority entitles a foreign corporation to do business in Rhode Island and affords it the same rights and duties as a domestic corporation. *Id.*, title 7, sec. 7–1.1–99, 7–1.1–100. Our decisions emphasizing legal authority rather than actual performance are based on the recognition that a performance test would place an impossible administrative burden on the procuring agency, since the agency could not reasonably be expected to monitor all the business the contractor might undertake during the course of performance. In this context, an interpretation of the Anti-Pinkerton Act under which a firm could be a detective agency in one state but not in another would produce an impossible result. The status of PSA in Massachusetts is thus sufficient for purposes of the statutory prohibition.

In view of the foregoing, we remain of the opinion that the award was in contravention of 5 U.S.C. § 3108 and therefore affirm our September 23 decision. However, the contract having since expired, corrective action with respect to Contract N00140–76–C–6304 for the performance year beginning December 11, 1975, is no longer feasible and the recommendation to cancel is moot.

With respect to any future award to the corporation, we note again that the corporation is no longer authorized by its charter to perform investigative services, and that it has applied for a guard service license. In conjunction with this, unless Mr. Green is able to show some degree of separateness between his two capacities, he should be advised to divest himself of his private detective license. If, as he has stated, he has no intention of undertaking any detective or investigative work, this should not be objectionable. On these terms, a future award to the corporation would not violate the Anti-Pinkerton Act.

Navy urges that our recommended guidelines are "inadvisable" for two reasons:

(1) The bidder's self-certification is accepted in numerous other areas such as—

> ICC licenses and local licenses held by household goods contractors; AEC licenses to firms permitting them to handle nuclear material and dispose of nuclear wastes; licenses held by operators of flying schools; representations as to being a manufacturer or regular dealer under Walsh-Healy, etc. * * *

(2) The required documents "would become elements of responsiveness rather than factors of responsibility as they have been considered in the past."

Navy's first reason appears to be based on the premise that if self-certification is adequate in the other areas cited, it should be adequate for Anti-Pinkerton Act purposes. Our guidelines, however, were based on the fact, as amply evidenced by the complications of this case, that self-certification in this area has not proved to be satisfactory.

With respect to the issue of responsiveness versus responsibility, the mere fact that a writing is required to be submitted with a bid does not automatically make it a matter of responsiveness. 48 Comp. Gen. 659, 662 (1969); B–177245, May 7, 1973. The status of a bidder or offeror with respect to the Anti-Pinkerton Act has traditionally been viewed as a matter of responsibility, and this view is reinforced by our decisions permitting corrections of charters and licenses after bid opening. Our guidelines contain nothing to change this view.

It is our opinion that the Anti-Pinkerton Act no longer serves a useful purpose, and we plan to submit to the 95th Congress a recommendation for its repeal. As long as the Act remains in effect, however, we believe it is in the interests of all concerned—this Office, procuring agencies, and bidders—to minimize as far as possible the protest activity we are encountering under it and the attendant expense to both the Government and the private sector. Our guidelines, when viewed in conjunction with our decisions permitting corrections after bid opening, were designed to accomplish this objective at minimal cost, and we still believe they are useful.

[B–180769]

Maritime Matters—Vessels—Sales—Minimum Acceptable Bid Price

Portion of prior decision 54 Comp. Gen. 830, holding that Maritime Administration's establishment of a minimum acceptable bid price for surplus vessels and that its rejection of bids below that price was not subject to objection in view of broad discretion vested in Secretary of Commerce, is affirmed since record does not establish that agency acted arbitrarily or in bad faith. Prior holding that absence from solicitation of minimum acceptable bid price does not comport with competitive bidding requirements is modified in view of subsequent case law and absence of specific statutory requirement for disclosure of minimum price.

Vessels—Sales—Price Determination

Requirement that minimum acceptable price be determined on "current" basis and that evaluation of bids not be based on speculative factors does not preclude consideration of changing and projected market conditions in establishing minimum acceptable price.

In the matter of the Nicolai Joffe Corporation, reconsideration, January 6, 1977:

Nicolai Joffe Corporation (Joffe) has requested reconsideration of our decision in *Nicolai Joffe Corporation*, 54 Comp. Gen. 830 (1975),

75-1 CPD 204, in which we denied its protest of the rejection of bids submitted in response to invitation for bids (IFB) No. PD-X-971, issued by the Maritime Administration (MarAd), United States Department of Commerce.

The rejected bids were offers to purchase for scrap six surplus merchant vessels from the National Defense Reserve Fleet. Joffe's all-or-none bid of $21.42 per ton was the highest aggregate bid received. MarAd rejected all bids for the six vessels because it determined that the bid prices were unreasonably low in light of its minimum acceptable price per ton of $30.00. The determination of a minimum acceptable price was made after receipt and examination of bids.

In our prior decision, we found no basis to disturb MarAd's determination that the prices offered were unreasonable. However, we recommended that MarAd should determine its minimum acceptable price prior to bidding and disclose that price to bidders. Joffe contends that MarAd's determination that the bids were unreasonably priced was erroneous and made in bad faith, and requests that the solicitation be reinstated with an award made thereunder to Joffe. Also, both MarAd and Joffe object to the recommendation that the agency determine and disclose an acceptable price prior to the submission of bids.

MarAd's authority to conduct these sales is found in section 508 of the Merchant Marine Act of 1936, 46 U.S.C. § 1158 (1970), which reads as follows:

> If the Secretary of Commerce shall determine that any vessel transferred to the Department of Commerce, as the successor to the United States Maritime Commission, or hereafter acquired, is of insufficient value for commercial or military operation to warrant its further preservation, the Secretary is authorized (1) to scrap said vessel, or (2) to sell such vessel for cash, after appraisement and due advertisement, and upon competitive sealed bids, either to citizens of the United States or to aliens * * *.

MarAd has adopted the guidelines contained in sections 5 and 6 of the Merchant Marine Act of 1920, 46 U.S.C. §§ 864 and 865, in its disposal of these vessels. Those statutes involve the sale of vessels that will be used in commerce, not scrapped. 46 U.S.C. 864 provides:

> * * * the Secretary of Commerce is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 865 of this title, all of the vessels acquired by the commission under former sections 862 and 863 of this title or otherwise. Such sale shall be made at such prices and on such terms and conditions as the Secretary may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The Secretary in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other fact or

condition that would influence a prudent, solvent business man in the sale of similar vessels or property which he is not forced to sell. * * *

The award and rejection provision of the invitation stated:

VIII. *Award and Rejection of Bids.* The Contracting Officer reserves the right to reject any and all bids, call for new bids, waive any informality in any bid and make such award or awards as he may deem most advantageous, or will best serve the purposes and policy of the Merchant Marine Act, 1936, as amended, or other applicable law.

In our prior decision, while noting that MarAd had neither written procedures for setting a minimum acceptable price nor regulations governing sales procedures, we found "no basis to challenge the manner in which the minimum acceptable bid was established in view of the statutory discretion vested in the Secretary of Commerce." 54 Comp. Gen. at 834. We further noted, however, that a substantial majority of the ships offered for sale in a solicitation are not sold because all bids received on a given ship are regarded by MarAd as too low. For example, under PD–X–971, only 4 of 13 vessels offered were sold, with the high bids on 9 rejected as too low or below MarAd's minimum acceptable bid, a 70 percent rejection rate. The immediately preceding sale (PD–X–970) had a 63 percent rejection rate. We said that this "continuing high rate of rejection must discourage competition since bidders will be reluctant to expend the time and money to prepare and submit a bid when it is likely that most of the ships offered for sale will, in fact, not be sold." 54 Comp. Gen. at 832. We went on to state our belief that:

competition would be served by establishing in advance the minimum acceptable price per ton for each ship and providing that information in the invitation for bids. The price per ton established should take into consideration the current market and any particular circumstances which would warrant a minimum price above or below the market * * *. 54 Comp. Gen. at 833.

We concluded that the six vessels involved in the protest should be readvertised, with the minimum acceptable price disclosed in the IFB.

Joffe's request for reconsideration is founded on its contention that whatever discretion the Secretary of Commerce may have, that discretion is subject to the legal obligation of MarAd not to reject all bids unless there is a cogent or compelling reason. In this regard, Joffe has submitted arguments that MarAd's determination that Joffe's bid was unreasonably low was clearly erroneous and made in bad faith. Moreover, Joffe contends that it can show that its bid was reasonable and that the contracting officer actually believed that Joffe's bid was reasonable because she initially contemplated making an award to Joffe.

MarAd has summarized its procedure for evaluating the acceptability of bid prices as follows:

1. Bids are examined in terms of the recent bidding history of the coastal area in which the bidder is located. However, no tentative minimum acceptable price is determined in this step.

Note: The coastal distinction is based on sales experience that bids from shipbreakers located on the Gulf, East and West Coasts consistently vary.

2. If the bids received, upon examination, do not reflect the coastal bidding trend of recent invitations, an attempt to reconcile or explain this difference is made by considering the markets into which steel scrap is sold and the resulting resale profits that would likely be realized. As part of this step a tentative minimum price per ton is determined.

* * * * * * *

[More specifically] bidding history and scrap market trends are used to tentatively determine a figure. As a second procedural step MarAd's shipbreaker cost and vessel inventory information is used to confirm the tentative figure or suggest possible adjustments.

* * * * * * *

3. The impact of export controls on this tentative price is evaluated.

4. Other known factors are used to confirm the tentative minimum price, such as shipbreaker vessel inventories and, on an industry-wide basis, towage and shipping costs. The effect of steps #3 and #4 is to either adjust or confirm the tentative minimum price *and* in many cases to explain why some bids do not reflect recent bidding trends.

5. The minimum acceptable price is finally determined.

In the instant sale, MarAd explains:

* * * the protester's and other bids were first found to be well below recent bidding trends on the West Coast where the six vessels were located based on the range of bids received in a preceding invitations.[3] Then a tentative minimum price of $30.00 was determined.[4] This figure was then analyzed in terms of both the foreign *and* the domestic prices that would be available for the vessels when converted to scrap. The foreign price was and has been used because * * * a large portion of the scrap derived from its surplus ships is and has been exported.[5] The ships' value may therefore be evaluated in terms of an export value for scrap metal. The tentative price was then confirmed by export control and cost factors that apply generally to potential purchasers.

MarAd's statement included the following applicable footnotes:

[3] In PDX-964, opened October 10, 1973, the bids ranged from $9.50 to $32.94 per long ton with an average for accepted bids of $25.95. In PDX-967 the range was from $11.00 to $41.07 per ton with an average for accepted bids of $38.83. In PDX-968 the range was from $17.21 to $30.32, although no ships were awarded. [This range] excluded some nominal bids of $15.00 per ton or less.

[4] The average price on ships sold in PDX-967 was $38.83 at a time when the domestic price for scrap was $63.00 per long ton. The February (PDX-971) price ranged above $70.00, so a $30.00 minimum price was tentatively chosen on this basis.

[5] U.S. scrap exports increased from 6.3 million short tons in 1971 to 11.3 million in 1973 prior to the imposition of export controls. Controls will set the 1974 figure at 8.4 million short tons. See Department of Commerce Press Release No. 6-74-26. dated February 15, 1974.

Joffe contends that the explanation given above is not an accurate description of the process used by MarAd to set a minimum acceptable price for the six vessels. Joffe argues that the actual basis for rejection of its bid was set forth in a memorandum issued by MarAd's

Chief, Division of Reserve Fleet, which was referred to in our prior decision as a memorandum of the meeting during which the minimum price for PD–X–971 was established. The memorandum reads in pertinent part:

> The lowest accepted price at the last bid opening *PD–X–970 opened 12/14/73 was $30.24 per ton.* Since that opening there has been an increase in the composite domestic price of No. 1 Heavy Melting Scrap Steel—from $72.44 per ton to $87.76 per ton (about 21%). There has been an increase in the Eastern Market price (Buffalo, Philadelphia and Pittsburgh) from $71.00 to $89.83 per ton (about 27%); Central Market price (Birmingham, Houston, Chicago and Cleveland) from $75.50 to $99.63 per ton (about 32%); and Western Market price (San Francisco, Los Angeles and Seattle) from $70.83 to $73.83 per ton (about 4%)—[American Metal Market—2/13/74].
>
> * * * * * * *
>
> It has been noted that the price of scrap steel is approximately 18% higher in the Eastern Region and 26% higher in the Central Region than in the Western Region. However, from the analysis of bids in light of this situation, bids received on the * * * [6 vesse's] from West Coast bidders were approximately 40% below the recommended accepted bids on the East Coast and therefore inadequate. It must be noted that in December 1973 (PD–X–967) we received approximately $38.00 per ton for ships in the Western Region, at a time when the price of scrap steel was about $63.00 per ton.

MarAd denies that the memorandum reflects the actual basis of MarAd's decision to reject the bids. The agency states that the award of vessels occurs only after a committee of three members of the MarAd Office of Domestic Shipping, in the presence of a member of the MarAd Office of General Counsel, develops a minimum price in accordance with the MarAd procedure described above. MarAd states that the memorandum was prepared before the committee met and contains the reasoning solely of its author and not the committee.

Joffe contends, however, that even under MarAd's established procedure, the decision to reject Joffe's bid as unreasonably low was erroneous for several reasons. First, Joffe submits that MarAd's procedure is predicated on the incorrect assumption that all surplus vessels being sold have the same value per ton regardless of their type or whether they are being sold as scrap or for nontransportation use. Joffe asserts that "the sales price of a vessel for nontransportation use is not indicative of its scrapping value." Joffe further asserts that price is affected by such things as the difficulty involved in the break-up of a particular vessel and the different types of equipment on the vessel.

Second, Joffe asserts that MarAd chose an improper measure of shipbreaking costs for the West Coast. MarAd had stated that in confirming a $30 per ton rate as reasonable, it subtracted $44.30 as the average shipbreaking cost for the West Coast and the $30 per ton minimum acquisition price from a figure representing the domestic market value of scrap in order to determine if bidders could obtain a reasonable profit in the circumstances. Before the issuance of our prior decision, MarAd stated that the $44.30 represented:

[t]he Office of Domestic Shipping's estimate of the present average cost, excluding bids, of scrapping a vessel in shipbreaking yards on the West Coast.

Subsequently, MarAd acknowledged that the $44.30 figure was actually based on an estimate of one East Coast shipbreaker to which was added a 7% factor "for escalation" and a 15% factor "to cover the known higher labor costs that existed on the West Coast."

Joffe argues that this admission that $44.30 was not an "average cost" and not based on the costs of shipbreakers on the West Coast indicates MarAd's bad faith. Moreover, Joffe points out that the use of an adjusted East Coast figure is an apparent contradiction of statements by MarAd to the effect that costs on the East Coast and West Coast cannot be compared. Joffe also suggests that the cost received from the East Coast shipbreaker reflected only direct labor charges and not overhead.

Finally, Joffe contends that MarAd acted improperly in considering potential domestic and Far East markets for scrap because of the speculative nature of those markets. According to Joffe, the domestic market is so volatile that predicting its potential levels necessarily involves a considerable amount of speculation, while the potential market in the Far East is even more speculative because of Government restrictions on the export of scrap iron. For example, Joffe points out that at the time of bid opening it had a quota of 4,000 tons for export for the first quarter of the year but that it did not know its quotas for future quarters. Joffe estimates that, if its quota were to remain constant, it would take a year and a half to export the scrap iron, during which time the Far East market could change drastically.

MarAd disagrees with all of Joffe's contentions. For example, MarAd states that while it cannot verify that different equipment on various types of ships affects values, even the possibility that prices could be affected would not indicate that its evaluation was erroneous because the minimum sale price was established on the basis of scrap value alone, i.e., the vessel's lowest value to bidders, without regard to the possible higher value which a particular vessel might have because of its equipment. As for the intended use of a particular vessel, MarAd states that there is no evidence, despite Joffe's speculations,

* * * that vessels purchased for nontransportation use are being widely utilized or have substantial value for nontransportation purposes other than their residual scrap value. In fact, there is some evidence to suggest that nontransportation purchases, which carry no requirement to scrap the vessel within a specific time frame, are used by shipbreakers to build longterm raw material inventories.

With regard to its methodology for determining the minimum acceptable price, MarAd states that its evaluation process

* * * assess[es] the *present* value of the vessels to the United States. Such present value is, and must be, determined in part on the basis [of] the ship's poten-

tial resale value over time. There are two basic reasons for this conclusion. First the sales authority directs that all relevant factors be taken into account in selling these vessels. 46 U.S.C. §§ 864 and 865. * * * As a careful seller, the United States must * * * attempt to assess the present potential of these ships as export scrap in its evaluation process because this market potential clearly affects the present value of the ships. The second reason is * * * if the statute did not require that all factors relevant to their value be considered in the vessel's sale, the agency could not responsibly administer sales in such a volatile market without considering the impact of prospective market price changes.

Moreover, MarAd states that it

* * * knew that the vast majority of its shipbreaker bidders were purchasing its vessels for export in the rapidly ascending foreign scrap market. * * * the agency could and did rely on the rising foreign market prices for steel scrap in setting its minimum price at $30 per long ton. * * * few if any shipbreakers were selling domestically when the bids in PD–X–971 were evaluated * * *. Rather, they were exporting scrap for about $160.00 per long ton [the domestic price was between $70.00 and $80.00].

MarAd also points out that the domestic market continued to rise substantially in the months immediately following the opening of bids and that this provided a reasonable opportunity for profit for a bidder who had met the minimum price of $30 per ton.

We have given careful consideration to the many arguments made by Joffe and MarAd, including some not deemed necessary or relevant to our disposition of this matter and which therefore are not set forth above. In so doing, we have taken into account the various submissions considered in connection with our original decision as well as those submitted after reconsideration of that decision was requested. We have concluded, on the basis of this voluminous record, that our original decision should be affirmed in part and modified in part.

First of all, we do have some question with respect to how MarAd arrives at a minimum acceptable price. For example, we do not fully understand why, in this case, MarAd relied on an East Coast price estimate to establish a West Coast price. More importantly, since MarAd seems to concede the possibility that shipboard equipment could have an effect on the ship's value, it seems to us that MarAd's consideration of recent bidding history in tentatively determining minimum acceptable prices, without considering if the prices bid on particular ships in a prior sale might have been higher because of the value of the ships' equipment, could result in the establishment of an inflated minimum price for current sales.

Overall, however, we find that the record does not establish that MarAd acted arbitrarily or in bad faith in rejecting all bids or in establishing the minimum acceptable price. First, although MarAd and Joffe disagree as to the propriety of taking into account the type of ship being sold or the use to which it may be put when establishing the minimum acceptable price, Joffe has not conclusively established on this record that the position of MarAd, the agency charged by statute with the duty to sell ships and which in the discharge of that

duty has acquired experience and expertise in the area, is incorrect. Neither has Joffe convincingly established that MarAd's failure to consider shipboard equipment rendered its minimum price determination unreasonable in this case.

Secondly, we cannot say that MarAd abused its broad discretion in considering potential foreign and domestic scrap markets. In this connection, we point out that Joffe misreads our cases dealing with surplus vessel disposal and use of speculative factors in evaluating bids. In B–169094(2), August 13, 1971, we said:

> * * * we believe the floor price for sales to citizens should be determined on a current basis and include consideration of all relevant factors, including those specified in section 5 [46 U.S.C. 864].

That statement was made in response to an assertion that MarAd was using a previously established floor price without regard to changed market conditions and was not meant to preclude MarAd's consideration of all currently relevant factors, including reasonably based market projections. Although such projections may involve some degree of speculation, we do not believe that MarAd should be precluded from making those projections in light of the statutory guidelines adopted by MarAd for these sales, which call for MarAd to consider "any other facts or conditions that would influence a prudent, solvent business man * * *." 46 U.S.C. § 864. Moreover, the cases cited by Joffe (e.g., 51 Comp. Gen. 645 (1972); 47 *id.* 233 (1967)) for the proposition that speculative factors may not be used in the evaluation of bids all involve the use of such factors to discern the low or most favorable bid and are not strictly applicable to the instant situation involving a determination of a fair and reasonable (minimum acceptable) price.

Third, even if the contracting officer initially might have contemplated making an award to Joffe—the record is not conclusive on this point—that would not establish that Joffe's bid was reasonable and that MarAd's minimum acceptable price was unreasonable. As indicated above, MarAd utilizes a committee to develop a minimum acceptable price. Since the record indicates that the price for this sale was determined after the time Joffe says the contracting officer had indicated that she was considering an award to Joffe, the contracting officer's alleged actions can only be regarded as premature and not indicative of bad faith on the part of MarAd in subsequently determining that the minimum acceptable price for the sale was $30 per ton.

Accordingly, we affirm that portion of our decision relative to our conclusion that MarAd did not abuse its discretion in determining a minimum acceptable price.

Upon further reflection, however, we believe modification of the

prior decision is warranted with respect to our conclusions regarding competitive bidding requirements. In our prior decision we noted that (1) a large number of bids are rejected as unreasonably low and that (2) a bidder who happens to bid on a vessel that must be disposed of promptly is awarded the vessel while other bidders who bid a higher price per ton on another vessel under the same solicitation may have their bids rejected as too low. We felt that this situation tended to undermine the integrity of the competitive bidding system and that competition would be served by establishing in advance the minimum acceptable price per ton for each ship and providing that information in the solicitation. Therefore, we concluded that the six vessels involved in the protest should be readvertised under a solicitation which disclosed the minimum acceptable price.

On reconsideration, we think it unlikely that pre-bid disclosure of the minimum price acceptable to MarAd will cure the problem at hand. The heart of the controversy concerns the reasonableness of MarAd's determination of minimum acceptable price. The protester's position is that MarAd arbitrarily rejected its high bids for these six surplus vessels because MarAd erroneously established, after receipt of bids, a single, unreasonably high, minimum sales price for the six vessels while MarAd, on the other hand, argues that the protester's bid prices for the vessels were unreasonably low. If, as the protester contends, MarAd's determination of minimum price is based on erroneous assumptions, little will be gained by requiring MarAd to disclose its minimum price prior to bidding. Thus, although pre-bid disclosure would place bidders on notice of what MarAd considers to be a minimum acceptable price and would therefore enable would-be bidders to avoid bidding in situations in which they were not interested in meeting MarAd's minimum price, it would not resolve the basic question of the reasonableness or arbitrariness of MarAd's minimum price determination.

Furthermore, subsequent to our initial decision in this case, we held that in the absence of a statute or regulation so requiring, an agency was not required to make available to bidders the appraised fair market value of land to be leased. *Ramona Sutfin*, B-180963, September 9, 1974, 74-2 CPD 155. Here, as in that case, and unlike situations involving the sale of Navy vessels, *see* 10 U.S.C. 7304(c)(1) (1970), the relevant statute contains no requirement that MarAd's appraisement be made public prior to the solicitation of bids.

Accordingly, we do not believe it appropriate for this Office to insist that MarAd disclose a vessel appraisement price in its sales solicitations, and our decision is modified to that extent. However, we are still concerned, from a policy standpoint, over the high bid rejection rate and the other matters discussed in the previous decision. In view

thereof, we are reiterating our recommendation, made to the Secretary of Commerce in connection with our prior decision, that MarAd consider taking into account the bidding history of vessels by type when making cost appraisements. We are also recommending that MarAd consider taking into account the effect of shipboard equipment on bidding levels.

In light of our concern in this area, MarAd's ship sales also will remain the subject of continuing audit interest.

[B–186359]

Contracts—Mistakes—Allegation After Award—No Basis for Relief

Reaffirmation of extremely low bid following meeting called to discuss suspected mistake, at which prospective contractor had opportunity to review specifications and compare Government estimate with his own, satisfies Armed Services Procurement Regulation 2–406.3, and acceptance creates valid contract.

Contracts—Mistakes—Unconscionable to Take Advantage—Claim Not Supported by Evidence

Where vice president, now president, of contracting firm attended but did not actively participate in meeting to discuss suspected mistake, he cannot later be heard to say contract is unconscionable.

In the matter of Peterman, Windham & Yaughn, Inc., January 12, 1977:

On grounds of a mistake in bid discovered 13 months after award, Peterman, Windham & Yaughn, Inc., a small business, requests an increase of $51,717.29 in contract No. F09650–74–C–0335, covering repair of hangar doors in two buildings at Warner Robins Air Logistics Center, Georgia.

Invitation for bids (IFB) No. F9650–74–B–0678, issued on March 7, 1974, called for "repair" of an existing trolley busway system in Building 110 and "installation" of a trolley busway system and associated hardware on horizontal doors in Building 125. (Trolley busways are used in connection with pushbuttons and warning horns to operate hangar doors.)

On bid opening date, April 12, 1974, the two bids received were both below the Government estimate of $111,000, which on the basis of previous work to the hangar doors had been considered fairly accurate. The totals, reflecting a base price and each of two additive items, were as follows:

Peterman, Windham & Yaughn, Inc.	$40,978.35
R&D Constructors, Inc.	$99,175.00

W. J. Yaughn, then vice president and now president of Peterman, Windham & Yaughn, Inc., attended the bid opening and thus knew of

the difference between the two bids as well as of the Government estimate. In addition, the contracting officer formally notified the firm of the discrepancy. The firm verified the bid on April 15, 1974, in a letter signed by H. Gordon Windham, president.

Since both procurement and civil engineering personnel at the air center still suspected a serious error in the low bid, a meeting was held on either April 19 or April 23, 1974 (both dates appear in the record), for the purpose of reviewing specifications and determining whether a mistake actually had been made. The record includes a sworn statement by Mr. Yaughn and memorandums prepared by Air Force personnel concerning that meeting. Attending were Mr. Windham, Mr. Yaughn, and representatives of the contracting officer and of the base Civil Engineering Division.

While there are some conflicts in the memorandums, it is agreed that Mr. Yaughn did not participate actively in the discussion. Mr. Windham briefly compared the 11-page Government estimate with his own 5-page estimate and asked for clarification of some specifications not relating to the trolley busway system. Unable to discover any error, he is reported to have stated that he was familiar with the hangar doors, had access to economical sources of material and efficient labor, and could complete the job on time and at a profit. The contract was awarded to Peterman, Windham & Yaughn, Inc., on May 2, 1974. Various amendments adding work and extending the completion date are not relevant to this request for modification of the contract price.

Work by the contractor proceeded on schedule until mid-December 1974, after which little progress apparently was made. On January 24, 1975, the contractor was informed that work was 11.55 percent delinquent, and on March 18, 1975, the firm was presented with a show cause notice stating that the Government was considering termination for default. On March 28, 1975, Mr. Yaughn informed the contracting officer that the firm had been reorganized and that he had become its president. The firm wished to proceed with the contract, Mr. Yaughn stated, but required further clarification of specifications and drawings and additional time to obtain material from suppliers. Work remaining to be done was discussed at a meeting between Mr. Yaughn and the contracting officer on April 8, 1975, but the required trolley busway system for Building 125 was not mentioned. The fact that it had not been installed was discovered during an inspection on June 9, 1975. Given a choice of performance or termination for default, the contractor completed installation of the trolley busway in December 1975.

A mistake in bid, based on omission of the trolley busway system for Building 125 from the contractor's estimate, first was alleged on June 17, 1975. The initial request for modification of the contract price was in the amount of $29,762.52, the estimated cost of materials

and labor for installation of the trolley busway system. This request was denied by the Air Force Logistics Command in a decision dated November 7, 1975. It held that the mistake was a unilateral one for which there was no legal basis for relief under Public Law 85–804 [codified at 50 U.S.C. 1431 and implemented by Armed Services Procurement Regulation (ASPR) § 17.204.3 (1975 ed.)], which requires that such action facilitate the national defense. The April 13, 1976, request to this Office for modification in the amount of $51,717.29 represents the actual cost of installing the trolley busway system according to the contractor; the Air Force, however, questions the accuracy of this figure.

The first issue for consideration here is whether a valid and binding contract was consummated by the Air Force's acceptance of Peterman, Windham & Yaughn's low bid. Counsel for the contractor argues that modification of the contract should be approved because the contracting officer did not adequately fulfill his duty to verify the low bid.

The general rule as to a mistake in bid alleged after award is that the bidder must bear the consequences unless the mistake is mutual or the contracting officer had actual or constructive notice of the error prior to award. *Porta-Kamp Manufacturing Company, Inc.*, 54 Comp. Gen. 545 (1974), 74–2 CPD 393, and cases cited therein; *Boise Cascade Envelope Division*, B–185340, February 10, 1976, 76–1 CPD 86. At the outset, we agree with the Air Force that the mistake was unilateral. The fact that the trolley busway system was not discussed at the time Mr. Yaughn became president of the contracting firm, or that an inspector was unaware of the requirement, does not make the mistake mutual. Nor does the fact that progress payments had been made and work said to be 81 percent complete change our opinion. The specifications and drawings, incorporated in the IFB and in the contract, clearly called for installation of the trolley busway in Building 125, and the Government estimate made available to the contractor prior to award also included it. Thus, at the time the contract was executed, the mistake was unilateral.

When, as in this case, it is suspected that the low bidder has made a mistake, ASPR § 2–406.1 requires the contracting officer to seek verification. In addition to requesting a confirmation of the bid price, under ASPR § 2–406.3(e)(1) the contracting officer must advise the bidder, *inter alia*, of the fact that his bid is much lower than the other bids, of important or unusual characteristics of the specifications, and of such other data as will give notice of the suspected mistake. *See Porta-Kamp Manufacturing Company, Inc., supra; Ames Color File Corporation*, B–185873, March 26, 1976, 76–1 CPD 199; *Boise Cascade Envelope Division, supra; Aerospace America, Inc.*, B–181439, July 16, 1974, 74–2 CPD 33, affirmed upon reconsideration May 25, 1975, 75–1 CPD 313.

Counsel for the contractor argues that the contracting officer had a duty to "inquire in depth and dispel any suspicion or error on the part of the contractor," and that the meeting between Air Force personnel and Peterman, Windham & Yaughn, Inc., which was not documented at the time, was ineffective for this purpose. We are not persuaded. There is no requirement in ASPR § 2-406.3(e)(1) that verification be documented, although this was done later. *See Porta-Kamp Manufacturing Company, Inc., supra.*

In an analogous case in which the bidder alleged that it had erroneously estimated some costs and omitted others in computing its bid price, our Office held that a contracting officer need not determine before contract award whether every production cost element had been considered in connection with the bidder's price in order to discharge his duty to verify under ASPR § 2-406. *Aerospace America, Inc., supra.* Therein, we cited 47 Comp. Gen. 732, 742 (1968), in which we stated that:

> Errors of omissions and inaccuracies in your bidding estimates may have occurred but it was your responsibility to estimate the price at which you could perform the proposed contract at a reasonable profit. If you made a mistake in your bid, but failed to discover a mistake and allege such mistake prior to contract award, notwithstanding the fact that you were afforded every reasonable opportunity to check the bid before acceptance thereof, the Government cannot be held responsible for the resulting loss. * * *

In another case in which the bidder sought to impose a duty on the contracting officer to conduct a detailed technical review of the proposed design, we held that a preaward survey during which technical data had been reviewed and the bidder had indicated his understanding of the invitation satisfied the verification requirements set forth by the court in *United States* v. *Metro Novelty Manufacturing Co.*, 125 F. Supp. 713 (S.D.N.Y. 1954), and incorporated in ASPR § 2-406.3(e)(1). "Any higher standard of inquiry on the part of the survey team would have unduly involved the Government in a business judgment area reserved to bidders," we stated. B-169188, June 11, 1970.

Omission of the trolley busway system from Peterman, Windham & Yaughn's estimate was not apparent from the bid itself. The contracting officer had no knowledge of the specific nature of the error when verification initially was requested and obtained. We believe that by offering the prospective contractor an opportunity to review the specifications and to compare the Government's estimate with his own, the contracting officer adequately fulfilled any duty to assist the contractor in discovering a mistake. ASPR § 2-406.3(e)(2) permits the rejection of bids which are "far out of line" with the other bids received or the agency's estimate when "the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake." However, we do not believe that provision is applicable where, as

here, the bidder insists that no mistake was made even after meeting with the contracting officer for the purpose of comparing the bidder's worksheets with the agency's detailed estimate. See *Southern Rock, Inc.*, B-182069, January 30, 1975, 75-1 CPD 68.

After reaffirmation by Peterman, Windham & Yaughn, Inc., the contracting officer was not only justified in accepting the bid but would have failed in his duty had he done otherwise. 37 Comp. Gen. 786 (1958); 36 *id.* 27 (1956). Good faith acceptance of the bid therefore consummated a valid and binding contract. 47 Comp. Gen. 732, *supra; Ames Color File Corporation, supra; Boise Cascade Envelope Division, supra.*

The second issue for consideration here is whether the contract price was so low that "the Government was *obviously* getting something for nothing," entitling the contractor to relief under our decision in *Yankee Engineering Company, Inc.*, B-180573, June 19, 1974, 74-1 CPD 333. In that case, notwithstanding verification of an extremely low bid by the bidder, who subsequent to award alleged an error due to misreading of specifications, and statements by the procurement activity that it had unsuccessfully attempted to review specifications with the bidder, this Office concluded that it would be overreaching and unconscionable to require performance at the mistaken bid price. Commenting for the record in the instant case, the Air Force states:

* * * fundamental to the application of the ruling in *Yankee Engineering* is the requirement that a bona fide error caused the underpriced contract. It would be intolerable if just faulty judgments or careless cost estimates could enable bidders routinely to buy in on contracts, confident that price adjustments would be forthcoming on the basis of an alleged mistake. The burden should be on the contractor to establish convincingly the existence of a genuine error—a miscalculation of the sort that it would be patently unfair for the Government to benefit from.

In the instant case we do not believe that the record reveals a mistake of the quality which would warrant relief under the rule of *Yankee Engineering.* Indeed, * * * the mistake is not so great that the Government can be said to be "obviously getting something for nothing", the prime test of *Yankee Engineering.* Here we have a claimant, nominally a corporate entity, but really in the person of Mr. Yaughn, who blames the supposed error on Mr. Windham, his predecessor in office (and on the Government). In *Yankee Engineering* there was also a change in company personnel involved with the bid preparation. However, in that case there was documentary proof showing that the bid was based on supplying 6,025 feet of track instead of 10,180 feet required by the specifications. Here, the contemporaneous documents do not substantiate the allegation that the contractor was unaware of the requirement for installing the trolley busway on Building 125. Viewed as a whole, the facts in the record create a manifest uncertainty and substantial doubt as to whether a bona fide mistake was made.

* * * Mr. Yaughn says that due to the price difference, he was "stunned" and "almost hysterical" * * * following the bid opening. He admits that he thought there was a mistake prior to the April 1974 meeting. Yet he contends that, though a vice president and part owner of the contracting firm, he sat passively through the meeting and paid little attention to what was being studied and discussed. * * *

Given Mr. Yaughn's admitted knowledge of the pricing discrepancies from the time of the bid opening and his personal involvement with the Government's efforts to have his firm ascertain a possible error, we see little basis for giving separate consideration to the corporation under its present ownership and management. * * *

* * * Lastly, the size of the price differential itself does not warrant a bid modification. * * *

We do not dispute the contracting officer's finding that the specific mistake cannot be ascertained from the evidence submitted by the contractor. Work sheets include an estimate for the trolley busway in Building 110 but none for Building 125; however, there is $16,278 in the base price for which there is no itemized listing. The contracting officer surmises that estimates for numerous items were too low and/or that delay in purchasing supplies resulted in inflated costs.

Considering his role as vice president of Peterman, Windham & Yaughn, Inc. at the time of verification, we believe that Mr. Yaughn cannot now be heard to complain that the verification was inadequate or that acceptance of the low bid was unconscionable. Counsel for the contractor points out that the Government estimate for electrical work on Building 125 alone was more than $38,000; this estimate should have confirmed Mr. Yaughn's fears that something had been omitted from his firm's bid of $40,978.35. The burden was on him to have participated actively in discovering what that omission was before contract award.

The price differential is only one factor to be considered in determining unconscionability. The quantum of error here may be expressed in a variety of ways. For example, the $99,175 bid of R&D Construction Company, Inc., the only other bidder, was 242 percent of that of Peterman, Windham & Yaughn, Inc. But expressed in terms of the difference between the two bids, $58,196.65, Peterman, Windham & Yaughn's bid was only 58 percent below that of R&D. Our Office has found contracts to be unconscionable where the second low bid was between 280 and 300 percent greater than the contract price; on the other hand, differences of 53 and 58 percent have been held insufficient to demonstrate unconscionability. *Walter Motor Truck Company*, B-185385, April 22, 1976, 76-1 CPD 272, and cases cited therein.

In the instant case, we believe that the additional facts and circumstances preclude a finding of unconscionability under the doctrine of *Yankee Engineering*. Since the Government's agents did all that could have been expected to protect the contractor from its own imprudence, the Government cannot be charged with having "snapped up an advantageous offer made by mistake." *See* 47 Comp. Gen. 616, 623 (1968), citing *Alabama Shirt & Trouser Co.* v. *United States*, 121 Ct. Cl. 313, 331 (1952).

Accordingly, we conclude that there is no legal basis for modification of the contract price, and do not reach the questions raised by the Air Force as to the proper amount of relief due Peterman, Windham & Yaughn, Inc.

[B-186858]

Contracts—Negotiation—Evaluation Factors—Discount Terms

To extent that protest against Navy's cost reevaluation—which found that award was erroneously made to other than lowest cost offeror—implicitly calls into question sufficiency of request for proposals (RFP) evaluation factors, it is without merit. RFP adequately described evaluation factors and their relative importance; also, provisions are not viewed as defective or ambiguous when read together with agency instructions to offerors on pricing of discounts.

Equipment—Automatic Data Processing Systems—Computer Service—Benchmarking

Where initial cost evaluation considered only cost of one computer benchmark at $50,000 point, and Navy later conducted cost reevaluation which considered proposed prices in terms of monthly expenditure rate of $50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors, benchmark portion of offerors' pricing was to be based on monthly usage rate of $50,000.

Contracts—Negotiation—Requests for Proposals—Protests Under—Timeliness

Protests which caused agency to terminate contract and make award to protester was timely filed within 10 working days after protester knew basis of protest. Issues in counter-protest by contractor whose contract was terminated are also timely, with exception of allegation that substantially higher price level should have been used in benchmark portion of cost evaluation. Contractor, as incumbent at time proposals were solicited, should have raised this issue prior to closing date for receipt of revised proposals.

Contracts—Negotiation—Offers or Proposals—Prices—Reduction *v.* Modification

Agency properly declined to consider contractor's reduction in contract price in reaching decision to terminate contract for convenience of Government and reaward to offeror which was actually lowest in overall cost, because in prevailing circumstances price reduction amounted to late modification of unsuccessful proposal.

Contracts—Negotiation—Offers or Proposals—Time Sharing Computer Services

Proposal for computer time sharing services which reserved offeror's right to revise computer algorithm failed to conform to material RFP requirement that offerors submit fixed prices, because algorithm is directly related to proposed prices.

Contracts—Negotiation—Requests for Proposals—Computer Time Sharing Services—Requirements—Benchmark

Where RFP for computer time sharing services established benchmark requirements which related primarily to technical acceptability of proposals, and Navy regarded offeror's several performance discrepancies (time exceeded on 3 of 135 tasks, degradation factor exceeded on 1 of 3 benchmark runs) as minor, Navy's acceptance of proposal is not clearly shown to be without reasonable basis insofar as protestor's numerous objections concerning benchmark performance, memory allocation feature and 30-day contractor phase-in requirement are concerned.

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Contracts—Negotiation—Requests for Proposals—Computer Time Sharing Services—Requirements—Memory Allocation

Where RFP for computer time sharing services required that main memory protection must ensure integrity of user's area during operations, Navy's acceptance of proposal lacked reasonable basis because, upon technical review, proposal does not demonstrate that approach proposed by offeror meets requirement.

Contracts—Negotiation—Requests for Proposals—Computer Time Sharing Services—Requirements—Fixed Prices

Since protester's proposal was unacceptable due to failure to offer fixed prices as required by RFP, primary remedy requested in its protest—reinstatement of its contract which Navy terminated for convenience—is precluded.

General Accounting Office—Recommendations—Contracts—Reopen Negotiations

Where Navy accepted proposal which did not meet material RFP computer security requirement, protest is sustained and General Accounting Office recommends that Navy renew competition by reopening negotiations, obtaining revised proposals, and either awarding contract to protestor (if it is successful offeror) or modifying contractor's contract pursuant to its best and final offer (if it remains successful offeror).

In the matter of the Computer Network Corporation; Tymshare, Inc., January 14, 1977:

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I. INTRODUCTION

This is our decision on protests by Computer Network Corporation (COMNET) and Tymshare, Inc., in connection with request for proposals (RFP) No. N00600-76-R-5078, issued by the Naval Regional Procurement Office, Naval Supply Systems Command, Washington, D.C.

The Navy awarded a contract to Tymshare under the RFP. COMNET protested to our Office, contending that it should have received the award. In accordance with our Bid Protest Procedures (4 C.F.R. 20 (1976)), we requested a documented report from the Navy responsive to the protest.

On examining COMNET's protest the Navy concluded that it was meritorious. The Navy made preparations to terminate Tymshare's contract for the convenience of the Government and award to COMNET. When it learned of these developments, Tymshare protested to our Office against any such action.

In its August 6, 1976 report to our Office concerning the two protests, the Navy explained the reasons for its belief that termination and reaward were appropriate, and also recommended denial of Tymshare's protest. Shortly thereafter, the Navy proceeded to terminate Tymshare's contract and award to COMNET. In the present posture of the case, Tymshare is thus the real complaining party. Tymshare seeks termination of COMNET's contract and either a reinstatement of its contract or a resolicitation. Alternatively, Tymshare believes that, at a minimum, the options in the COMNET contract should not be exercised.

The major issues presented involve (1) the cost evaluations conducted by the Navy and (2) COMNET's performance on the benchmark test and the technical acceptability of its proposal.

II. BACKGROUND

The RFP called for computer time-sharing services for a period of 1 year, with options for two additional 1-year periods. It established a sequence consisting of submission of technical proposals, which would be evaluated to determine their acceptability, to be followed by benchmark testing, and finally submission of price proposals. Section D of the RFP set forth the evaluation factors, and provided in pertinent part:

> A. *Technical Proposal*
> The technical proposals will be evaluated and reviewed to ensure offerors comply in all areas of the specifications set forth in Section F. All elements of the specifications are of equal importance and shall be evaluated as such.
> B. *Price Proposal*
> The price proposals will be evaluated on the following, listed in descending order of importance:
> 1. Benchmark invoice costs
> 2. On-line storage costs
> 3. Connect-time (User terminal and RDS)
> 4. Other costs (Training, Documentation, Software Engineer, etc.)
> Award will be made to the technically acceptable offeror who offers the lowest *overall* cost to the Government. [Italic in original.]

Section XVIII of the RFP also provided the following information on the relationship of the benchmark to the cost evaluation:

H. An invoice for each Benchmark process and a sum total invoice shall be prepared using dollar amounts. Invoices are to be given to Naval Regional Procurement Office representatives at the end of each Benchmark session. Benchmark cost figures will be used in the cost evaluation phase.

I. If applicable, use of discounts proposed will be illustrated on the Benchmark prices.

Appendix E to the RFP further provided:

A billing invoice for each process listed on Attachment 1 will be required to be submitted after successful demonstration of the benchmark. For each process the following information is required on the invoice: date and time of demonstration, process name, quantity and units of all resources used in the billing algorithm, and total cost for the process. The billing charges for the three data bases are to be accumulated under the Data Base Monitor processes. * * *

COMNET's and Tymshare's technical proposals were evaluated as acceptable and both passed the benchmark to the satisfaction of the Navy. The Navy's March 16, 1976 letter requested submission of price proposals and stated in pertinent part:

Page 43 of the solicitation contains the statement "If applicable, use of discounts proposed will be illustrated on the Benchmark prices". For purposes of illustrating discounts on the Benchmark prices (if any), a monthly invoice for all charges (before discounts) of greater than $50,000.00 can be assumed.

The Navy's April 14, 1976 letter to the offerors further stated:

* * * Benchmark price quotes should be based on a monthly usage rate of $50,000 exclusive of permanent disk storage costs (as suggested in amendment number 3). A price schedule that includes usage quantities from $0 to unlimited per month (i.e. pay as you go service schedule) is required.

Tymshare's final price proposal provided:

1. The following price schedule is based on a discount from TYMSHARE's standard prices and is provided for the Bureau of Naval Personnel, the Future System only, in three levels as per below:

a. *Level 1*

The first $45,000 billed within any month for connect hours and TRU's will be charged at the following:

Connect Hour Rate	*TRU Rate*
$10	$.25

b. *Level 2*

From 0 to 1000 connect hours *in excess of the first $45,000 billed* within any month, TYMSHARE will provide up to 1000 hours of dedicated terminal connect time and 175,000 TRU's at a flat rate of *$42.50 per dedicated terminal connect* hour. (Terminal connect hour is defined as up to 30 CPS terminal speed.)

c. *Level 3*

For usage above the initial *$45,000 in any month*, and *usage above either, or both, the 1000 terminal connect hours and the 175,000 TRU's*, the following schedules will apply:

CONNECT HOUR SCHEDULE

No. of Hours	*Hour/Rate ($)*
1001 to 5000	8
5001 to 7500	7
Over 7500	6

TRU SCHEDULE

No. of TRU's	*TRU/Rate ($)*
175,001 to 350,000	.2250
350,001 to 700,000	.2000
700,001 to 1,050,000	.1875
1,050,001 to 1,400,000	.1750
Over 1,400,000	.1500

[Italic in original.]

In the evaluation of the price proposals, the Navy used a numerical scoring scheme which had not been disclosed in the RFP. Numerical weights were given to the 4 subcriteria listed under price:

1. Benchmark invoice costs (40)
2. On-Line storage costs (30)
3. Connect time (20)
4. Other costs (10)

There was a further breakdown of the benchmark subcriteria weight, in that the various benchmark functions or jobs were weighted relative to each other. For each subcriteria, the offeror with the lowest cost was to be awarded the maximum number of points and the other offeror would receive proportionally fewer points in accordance with the following formula:

$$\frac{\text{Lowest price}}{\text{Individual price}} \times \text{weight} = \text{points}$$

In the Navy's evaluation, Tymshare received 82.335 out of a possible 100 points, COMNET received 79.452, and award was therefore made to Tymshare.

After the award to Tymshare, COMNET protested. Among other objections, COMNET challenged the Navy's evaluation of the Tymshare price proposal insofar as benchmark invoice costs and connect time were concerned. COMNET argued that the Navy erred in applying Tymshare's level 2 pricing for benchmark invoice costs and Tymshare's level 1 pricing for connect time. The net effect of this, in COMNET's view, was that Tymshare's low level 2 price for processing was evaluated without evaluating Tymshare's high level 2 price for connect time—even though the Navy would be billed the low processing charge only when it paid the high connect time charge. COMNET contended that either level 1 or level 2 had to be used consistently throughout the evaluation, and that whichever was used, COMNET's price was lower than Tymshare's.

Stated somewhat differently, COMNET's contention was that one cost element of the Tymshare proposal (connect time) was evaluated at one volume level (the first $45,000 billed within any month) whereas another cost element (benchmark) was evaluated at a different volume

level (in excess of the first $45,000 billed within any month). COMNET pointed out that since the Navy had stated that discounts would be evaluated assuming $50,000 in billings per month, it would be appropriate to use Tymshare's level 2 pricing consistently in reevaluating Tymshare's proposal.

The Navy's report to our Office dated August 6, 1976, stated:

> As a result of COMNET's protest, the Navy reevaluated the relative costs of both COMNET and TYMSHARE. In the reeva'uation the Navy calculated the average cost per bench mark using a monthly expenditure rate of $50,000 instead of using the cost of one bench mark at the $50,000 point. The use of average costs changed the bench mark portion of the cost evaluation dramatically because it took into account the high costs TYMSHARE proposed for the first $45,000.
>
> In the reevaluation the average bench mark cost for COMNET was only $1598.59, compared to $2699.41 for TYMSHARE. Overall, COMNET scored 99.989 points to TYMSHARE's 66.033.

It appears that the Navy's reevaluation took a somewhat different approach from what COMNET had suggested, because rather than consistent pricing of different elements at a given cost level, the Navy recalculated benchmark costs assuming monthly expenditures up to a $50,000 level. However, the result was nonetheless that COMNET's proposal was determined to be lower in overall costs than Tymshare's.

Based on the reevaluation, and despite Tymshare's protest, the Navy terminated Tymshare's contract and made an award to COMNET.

III. COST EVALUATION

While it appears that the RFP requested offerors to submit prices for the work to be done, it also spoke in terms of lowest overall costs and cost evaluation, and for the most part we will discuss the issues raised in terms of costs rather than prices.

1. Sufficiency of RFP

Tymshare's first major contention is that the Navy's initial cost evaluation properly concluded that its proposal was lowest in cost, based upon the RFP's evaluation criteria. Tymshare believes that any subsequent indication that Tymshare is not the low offeror means that the RFP evaluation criteria were faulty. Tymshare points out that offerors must be advised of the evaluation factors and their relative importance (citing *AEL Service Corporation, et al.*, 53 Comp. Gen. 800 (1974), 74-1 CPD 217) and contends that if a contract is improperly awarded because of ambiguous evaluation criteria, the proper remedy is to resolicit, with the existing contract being terminated for convenience only after resolicitation (citing *Linolex Systems, Inc.*, 54 Comp. Gen. 483 (1974), 74–2 CPD 296; *New England Engineering Co.*, B–184119, September 26, 1975, 75–2 CPD 197; and *Santa Fe Engineers, Inc.*, B–184284, September 26, 1975, 75–2 CPD 198). Tymshare strenuously objects to a termination followed by an award to another

offeror on the basis of a reevaluation applying evaluation criteria which were never disclosed in the RFP.

In this regard, we do not believe that the RFP's statement of evaluation factors was defective. We believe that RFP section D, *supra*, adequately described the evaluation factors, subfactors, and their relative importance. As we read the RFP, the decisive criterion was price or cost—i.e., given acceptable technical proposals, the one lowest in overall cost would be selected. Moreover, the subfactors or subcriteria under price proposals—benchmark invoice costs, *et al.*—were listed in descending order of importance, which has been viewed as an appropriate method of showing relative importance. See *BDM Service Company*, B-180245, May 9, 1974, 74-1 CPD 237, and decisions discussed therein. In contrast, we note that the critical point discussed in *AEL Service Corporation*, *supra*, was that failure to disclose the relative importance of subfactors or subcriteria which were essential characteristics or measurements of end item performance would be objectionable. As far as the undisclosed numerical weights attached to the price subcriteria are concerned, we note that Armed Services Procurement Regulation (ASPR) § 3-501(b)(3) section D(i) (1975 ed.) prohibits the disclosure to offerors in the RFP of the numerical weights to be employed in the evaluation of proposals. There is no basis in this case to conclude that the undisclosed numerical weights actually applied by the Navy in its cost evaluation were so out of line with the RFP as to be objectionable. See *Bayshore Systems Corporation*, B-184446, March 2, 1976, 76-1 CPD 146. Further, we do not see any defect or ambiguity when the RFP evaluation factors are considered together with the additional information provided to the offerors in the Navy's March 16 and April 14 letters. See the discussion *infra*. In short, the issue as we see it is not the sufficiency of the RFP, but rather the propriety of the Navy's initial cost evaluation and reevaluation.

In this connection, the decisions cited by Tymshare in which our Office recommended resolicitations are distinguishable from the present case, because they involved situations where the solicitations were ambiguous or otherwise defective. If an RFP is satisfactory but the agency errs in failing to properly evaluate the successful proposal, it may be appropriate and feasible to reevaluate, terminate for convenience and reaward to the offeror or offerors which should have received award in the first place. See, for example, *Computer Machinery Corporation*, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358.

2. Propriety of Cost Reevaluation

A second major argument advanced by Tymshare is that the Navy's cost reevaluation itself was improper because it was "outside" the

terms of the published RFP evaluation factors. The protester reviews the pertinent RFP provisions set forth *supra* and stresses that the Navy's March 16, 1976 letter specifically stated that a monthly invoice for all charges (before discounts) of greater than $50,000 could be assumed. Tymshare's July 28, 1976 letter to our Office summarizes its argument:

> There is only one way in which the [pertinent RFP provisions] can be interpreted. If a contractor has a discount beginning at $50,000 or less in any given month, the invoices submitted for the work actually performed on the Benchmark must be (or may be) at the discount rate. In other words, for purposes of the specific invoices submitted in response to the RFP, monthly invoices prior to the particular ones submitted of $50,000 have been assumed. Therefore, when Tymshare's proposal was analyzed and evaluated in accordance with the terms of the RFP, the invoice costs over $50,000 alone were considered. The reevaluation process engaged in by the Navy which shows Tymshare as the second low bidder, while purporting to be based upon invoice costs, is actually an evaluation of the amount of work performed during the initial $50,000 billing, an evaluation criterion never disclosed to any of the parties.

Stated differently, the argument is essentially that the RFP as amended specifically determined to evaluate prices only at discount for benchmark evaluation purposes. This argument hinges on the language in the Navy's March 16, 1976 letter to the offerors that monthly charges of greater than $50,000 could be assumed. However, as the Navy and COMNET point out, when the full text of the pertinent language is examined, it is clear that offerors were to assume monthly billings greater than $50,000 for the purpose of illustrating discounts, if any. Moreover, the Navy's April 14, 1976 letter, when read together with the earlier letter and pertinent RFP provisions, does not, in our opinion, offer any support for an interpretation that benchmark invoice costs would be evaluated "at discount." It must be noted that the Navy's stated objective pursuant to RFP section D was to determine which proposal offered the lowest overall costs. It would appear that the only reasonable interpretation is that which the Navy applied in making its cost reevaluation, i.e., that the benchmark should be costed using a monthly expenditure rate of $50,000 rather than the cost of one benchmark at the $50,000 point. We see no basis to object to the Navy's position in this matter.

A point related to the cost reevaluation is Tymshare's contention that its "connect time" should have been evaluated at less than the $10 figure (level 1 pricing) cited in its proposal. We think the only answer required for this allegation is that the offerors proposed certain prices in their offers, and any evaluation by the agency, whether an initial, erroneous evaluation or a corrected reevaluation, would necessarily be on the basis of the prices proposed.

3. Timeliness of Protests

Tymshare has further contended that COMNET's protest to our Office was untimely, citing *Fairchild Industries, Inc.*, B–184655, September 8, 1975, 75–2 CPD 140, a case where the protester was familiar with the type of evaluation formula used in the RFP, but failed to file its protest prior to the closing date for receipt of initial proposals. However, it seems clear that the genesis of COMNET's protest was not the statement of evaluation factors contained in the RFP, but the way the Navy initially applied the factors to the pricing in Tymshare's proposal. COMNET states that it did not learn this information until after the award to Tymshare when it received certain contractual documents on June 18, 1976, from the Navy pursuant to a Freedom of Information Act request. COMNET's protest to our Office was filed on July 1, 1976, fewer than 10 working days later.

Another argument presented by Tymshare is that neither COMNET nor the Navy has shown that the benchmark element of the cost evaluation presented a totally accurate picture of actual costs to the Government. Tymshare believes that there is, therefore, no reason to assume that the benchmark reevaluation is any more accurate a reflection of actual costs than the initial evaluation. Further, Tymshare points out that the reevaluation was based upon monthly billings up to $50,000, and alleges that a larger volume of use is actually contemplated. Tymshare contends that if billings at $87,500 are considered, Tymshare's average cost per benchmark is lower than COMNET's.

This contention involves several points. First, in awarding a requirements contract there is no such thing as absolute assurance of total costs to the Government. The total costs are not known until the contract is performed. The objective in evaluating bids or proposals is to obtain reasonable assurance that a selected offer will provide lowest overall costs. Second, we note that this contention does not involve the manner in which various cost elements of a competitor's proposal were evaluated (the subject of COMNET's protest) nor the propriety of the Navy's reevaluating benchmark costs to take into account monthly expenditures up to $50,000 (which Tymshare protested after it learned of the reevaluation). Rather, it involves a question as to whether some level of expenditure substantially higher than the $50,000 figure cited in the Navy's March 16 and April 14 letters would have been more appropriate for use in the cost evaluation. We note that Tymshare was the incumbent contractor at the time price proposals were solicited in March and April 1976. If Tymshare had reason to believe that use of a substantially

higher expenditure level was appropriate, it should have brought this point to the Navy's attention and protested, if necessary, prior to the closing date for receipt of revised price proposals (April 26, 1976). See 4 C.F.R. 20.2(b)(1) (1976). Unlike some of the other issues regarding the cost evaluations which indirectly (though properly) call into question the sufficiency of the RFP, we believe this particular objection is untimely.

4. Tymshare Contract Price Reduction

Tymshare also points out that on August 9, 1976, it unilaterally reduced its contract price—making continuation of its contract a more advantageous alternative than termination and award to COMNET. Tymshare believes the Navy erred in making an award to COMNET under these circumstances.

We see no merit in this contention. Contracts are to be awarded on the basis of the ground rules for the competition laid down in the RFP as properly applied to the proposals, consistent with applicable law and regulations. Developments occurring later, during contract performance, are not dispositive of the question of which offeror is or was entitled to award under the RFP. See *Corbetta Construction Company of Ilinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144; *Computer Machinery Corporation, supra.* Tymshare's contract price reduction amounted to a late modification to its proposal, and it would have been improper for the Navy to have considered it for the purpose of determining which offeror was entitled to the award.

5. Requirement for Fixed Prices

A final issue which should be addressed is COMNET's contention that Tymshare's proposal failed to offer fixed prices. In this regard, the RFP (page 18) required price proposals to respond to the following provision:

> Cost proposals must contain a full description of the vendor's algorithm for processing charges including the factors involved, component costs, the measurements taken, how units are measured, the points at which measurements are taken, and the weights applied to these measurements in arriving at billable charges. Also identified must be all over head charges that are in addition to hardware-processing charges. Also included must be any variation in price due to priority level or time of day.

Tymshare's initial price proposal provided:

> The TRU algorithm is proprietary and shall only be used by those Navy personnel evaluating TYMSHARE's services.
>
> TYMSHARE reserves the right to revise its algorithm during the life of the contract to reflect changes in hardware costs, inflationary pressures, operating system improvements, etc. Should an algorithm change be considered, an analysis of the impact of these changes on Navy operations will take place, and appropriate negotiations conducted.

Tymshare's revised price proposal did not withdraw or modify these provisions. Also, we note that the RFP provided at page 14:

> Method of Procurement is two-step negotiation. The first step calls for the submittal of a technical proposal only. After evaluation by the Government technical personnel, Offerors whose offer has been determined to be technically acceptable will then, and only then, proceed to step two.
> The second step is the submittal of a price proposal and performance of the Benchmark test. *The resulting contract will be a fixed price requirements contract.* [Italic supplied.]

Further, Amendment No. 2 to the RFP, December 8, 1975, contained the following question submitted by a prospective offeror and the Navy's answer:

> 46. Q. Is it correct to assume that prices are only firm for the first year and can be revised for the second and third year?
> A. *No, firm prices are to be submitted for all years. Award prices are not subject to change.* See page 141 Section J. [Italic supplied.]

The issue of failure to offer a fixed price more commonly arises in formally advertised procurements than in negotiated ones. See, for example, *Joy Manufacturing Company*, 54 Comp. Gen. 237 (1974), 74-2 CPD 183. See, however, *Computer Machinery Corporation*, *supra*, where we held that a portion of the successful proposal which failed to offer fixed or determinable prices—a material RFP requirement—should have been rejected. We think it is clear that the RFP in the present case established fixed prices as a material requirement, notwithstanding some references to offerors' "costs." Since the algorithm is related to the TRU's and since Tymshare's pricing, *supra*, is expressed with reference to the number of TRU's, Tymshare did not offer fixed prices and its proposal in our view was unacceptable. While the Navy apparently did not rely on this point as a basis for terminating Tymshare's contract, it furnishes another justification for that action.

In view of the foregoing, we see no basis to object to actions taken by the Navy in regard to the cost reevaluation.

IV. COMNET BENCHMARK RESULTS AND TECHNICAL ACCEPTABILITY

Tymshare has contended that award could not have been made to COMNET because COMNET failed the benchmark test, and because COMNET's proposal was technically unacceptable.

RFP section XVIII required a benchmark/demonstration of system capabilities, and RFP appendix E described a number of different benchmark tasks and specified, *inter alia*, maximum acceptable execution times. It appears that the benchmark was intended to serve a number of different functions in the procurement. The Navy's August 6, 1976 report suggests that the benchmark results had a bearing on confirming the technical acceptability of proposals, as well as deter-

mining a prospective contractor's responsibility. As already discussed, the benchmark provided information to be used in the cost evaluation phase. The RFP benchmark provisions also appear to establish, in part, a liquidated damages provision in the event of inadequate contractor performance (in regard to minimum response time limits). Overall, we think (as Tymshare apparently does) that in all probability the benchmark was primarily related to the question of technical acceptability of proposals.

At the outset, it is important to note that it is not the function of our Office to evaluate the technical acceptability of proposals. Evaluation of proposals is primarily the function of the contracting agency, and our examination of such issues in protests is limited to considering whether the agency's evaluations and conclusions are clearly without a reasonable basis. See *Julie Research Laboratories, Inc.*, 55 Comp. Gen. 374 (1975), 75-2 CPD 232, and decisions cited therein.

Also, in considering technical acceptability of proposals as it relates to a benchmark requirement, as well as in other contexts, we have observed that the rigid concept of responsiveness, which applies to bids submitted in formally advertised procurements, is not directly applicable to proposals submitted in a negotiated procurement which are initially determined to be technically acceptable. Thus, in *Linolex Systems, Inc., et al.*, 53 Comp. Gen. 895 (1974), 74-1 CPD 296, we noted the flexibility inherent in negotiated procurement procedures in holding that an offeror should have been given a further opportunity to run a live test demonstration of its equipment. See, also, 47 Comp. Gen. 29 (1967).

This flexibility is further illustrated by *Sycor Inc.*, B-180310, April 22, 1974, 74-1 CPD 207, where an offeror was given several days to correct some minor oversights in connection with a live test demonstration of a data entry system. We note that a decision cited by Tymshare (*Information Consultants*, B-183532, August 8, 1975, 75-2 CPD 96) involved review of an agency's determination that six specific deficiencies in benchmark performance, as well as a delay of more than a month in running the benchmark, were sufficiently serious to justify rejection of a proposal as technically unacceptable. Compare, also, *Unidynamics/St. Louis, Inc.*, B-181130, August 19, 1974, 74-2 CPD 107, with the decisions discussed above.

1. Benchmark Issues

Tymshare has contended that COMNET exceeded the minimum 5-second response time specified in the benchmark requirements. The contracting officer disagrees, and believes that Tymshare has misinterpreted the RFP; Tymshare disputes this. In any event we note, as

did COMNET, that while this requirement was included in the benchmark provisions, it essentially establishes a liquidated damages provision which applies in the event of deficient performance during the course of the contract. In this light, we think it would be difficult to conclude that a failure to meet the requirement on the benchmark demonstration, even if established, would necessarily call for rejection of a proposal as unacceptable.

Tymshare also contended that COMNET exceeded the maximum acceptab'e clock time on 7 of the 135 benchmark tasks. The contracting officer has pointed out that COMNET exceeded the limits on 3 tasks, not 7, and that Tymshare itself exceeded the limits on 1 task. We see no basis to disagree with the contracting officer's view that any performance discrepancies in this regard were relatively minor. See, also, *Elgar Corporation*, B–186660, October 20, 1976, 76–2 CPD 350, where we declined to find that either of two offerors was prejudiced where both had performed a benchmark under certain relaxed standards.

Tymshare has contended, in considerable detail, that COMNET's benchmark was conducted in a manner which could not be duplicated under actual operating conditions, as, for example, where 16 or more users are on the system simultaneously. The contracting officer replies, essentially, that Tymshare's peak loading hypothesis is quite unrealistic, and that COMNET's system can do the job. Tymshare, unconvinced, remains of the belief that more than 15 concurrent jobs will result in a "reduction in efficiency" of COMNET's system. We do not think Tymshare's response demonstrates the unreasonableness of the contracting officer's position, considering the contracting officer's additional observations that peak loading problems may slow down Tymshare's or any other contractor's system, and that Tymshare's argument is grounded on the assumption—invalid, in the Navy's view—that the benchmark does not reflect the way the Navy would actually use COMNET's system during performance of the contract.

A further contention by Tymshare is that COMNET performed its benchmark runs over a period of several days (March 19, 22, 25, 1976) and failed to successfully complete the three required benchmark runs consecutively or on 1 day, citing RFP appendix E, page 2. The RFP provision required three benchmark demonstration runs, and stated: "The start times of the demonstrations are 10 a.m., 2 p.m. * * *. If no discount shift is proposed the third run of the benchmark will commence at 8 p.m. (est)." While COMNET's demonstrations did not follow this schedule exactly, for reasons which need not be discussed in detail here, the language of the RFP is not, in any event, sufficiently

strong to establish that deviation from the schedule would necessarily call for rejection of an offeror's proposal as unacceptable.

Tymshare's protest also asserted that coincidental duplications of certain time elements in successive COMNET benchmark runs cast doubts on the accuracy of the benchmark results, and also that COMNET's benchmark run sheets do not match the detailed billing or accounting information subsequently furnished by COMNET to the Navy. The contracting officer reported, essentially, that both problems were due to malfunctioning Navy equipment, which Tymshare, based on its experience in performing the benchmark, doubts was the case. Tymshare continues to maintain, in some detail, that COMNET failed to meet the requirement for detailed billing invoices (RFP appendix E) and that there are discrepancies between the detailed billing invoices and the terminal run sheets. COMNET has responded, in summary, that Tymshare is misreading the pertinent data and does not understand the manual keyboard entry function of COMNET's system, which allows a small tolerance in entry of commands but does not impact on the accuracy of the detailed accounting information. We see no indication in the record that the Navy did not give due consideration to these issues in making an award to COMNET, and do not believe that the arguments presented by Tymshare establish any sufficient grounds for a conclusion that the Navy's position in this matter was clearly lacking a reasonable basis.

Further, Tymshare has protested that COMNET exceeded the degradation factor specified in the RFP on 2 of its 3 benchmark runs. The contracting officer reported, however, that the degradation factor was exceeded in only 1 of the 3 runs, and since COMNET established its technical competence by completing the other 2 runs satisfactorily, the Navy did not require an additional benchmark to be run.

This point, and the excessive times on 3 of the benchmark tasks, discussed *supra*, appear to be the only areas in which the record clearly establishes that COMNET did not meet benchmark requirements. In general, the Navy's position is that while neither offeror met all the benchmark requirements, the discrepancies in performance were so minor that further benchmark runs were not considered necessary. The Navy, in short, was satisfied that both offerors performed adequately on the benchmark.

The RFP did establish certain benchmark requirements, and any failure to fully meet the requirements is not a matter to be taken lightly. However, to apply the philosophy expressed in Tymshare's protest would suggest that the immediate rejection of an offeror's proposal as technically unacceptable is mandated when there is any shortcoming of any kind in performing the benchmark requirements.

While an RFP could presumably be structured to this degree of strictness, a reading of the present RFP does not offer much support for such an approach. For instance, the RFP does not contain statements that rerunning of a benchmark would not, in the agency's discretion, be permissible, or language that failure to meet particular requirements might or would be cause for proposal rejection.

In addition, it is arguable that such rigidity, as a general proposition, would not be fully consistent with the past recognition of flexibility in applying benchmark requirements (see *Sycor, Inc., supra*), or with the usual purpose of a benchmark (to establish the technical capability of an offeror's proposed equipment and approach). After reviewing all the issues associated with COMNET's performance on the benchmark, we cannot conclude that the information presented by Tymshare demonstrates that the Navy's position has no reasonable basis to support it.

2. Memory Allocation and Phase-In

An additional technical issue raised by Tymshare is that COMNET's proposal did not comply with the memory allocation requirements established in RFP section IV.A. In its initial protest submissions, Tymshare asserted that "program linking and overlay capability" would be necessary for COMNET's proposed equipment to meet the requirement, and that this capability was not specified in COMNET's proposal. As with the other technical issues raised, COMNET offered information refuting this allegation. The Navy considered and rejected Tymshare's contention. The contracting officer reported that in the Navy's technical judgment, program linking and overlay structures are part of the COMNET system, and that COMNET's memory size exceeds the RFP minimum requirement by 50 percent, and also greatly minimizes the need for overlay structures or excessive linking operations. In light of these observations, not responded to in Tymshare's comments, we are unable to conclude that the conflicting technical viewpoint expressed in Tymshare's protest is sufficient to show that the Navy's evaluation and judgment in this matter was clearly without a reasonable basis.

Tymshare further contends that COMNET is unable to convert 150 COBOL programs and to achieve satisfactory operation of the system within 30 days after the award of a contract, as required by RFP section XVII. Tymshare believes that these requirements are evidently being relaxed, because the Navy's August 6, 1976 report (prior to the award to COMNET) indicated that it would take COMNET 60 days to perform these tasks. However, the Navy later stated that the reference to 60 days was phrased merely as an estimate of the total time

needed to switch from Tymshare's system to COMNET's, and that the 30-day conversion period would be included within the 60-day period. COMNET also stated that it did not know why the Navy used the 60-day figure, but affirmed in any event that it would complete the necessary conversion within 30 days. Under the circumstances, we are unable to see any basis for objection to the Navy's position.

3. Privacy Act and Computer Security

The final and most serious issue regarding COMNET's technical acceptability pertains to the "Privacy" and "Security" requirements of the RFP. RFP sections VI and VII stated as follows:

VI. *Privacy.*

A. The contractor must be thoroughly familiar with the provisions of the Privacy Act of 1974 and must demonstrate that the proper administrative procedures, technical safeguards and contractor personnel training have been initiated to ensure that the Bureau of Naval Personnel can comply fully with the provisions of the Act while using the contractor's services.

B. The system will be used for the storage of personnel information that must, under the provisions of the Privacy Act of 1974, be safeguarded against unauthorized access and/or disclosure. Hence the system must:

1. Provide assurance that no users other than those specifically designated may gain access to the TOTAL data base or any user maintained files (reference paragraph VII).

2. Provide assurance that listings, data dumps, tapes or any other aggregates or extracts cannot be prepared from the data base by software other than that specifically approved by, and under the control of, the Bureau of Naval Personnel.

3. Provide required audit trails and logs of any accesses required by the contractor for purposes of routine hardware and software maintenance or backup.

4. Provide assurance of the ability to conform to additional modified statutes or regulations that may be issued.

5. Ensure that any system or network changes will permit the Bureau of Naval Personnel and the vendor to continue to comply with provisions of the Act.

VII. *Security.*

A. No classified data is scheduled under this announcement; however, all considerations for the system and network must be made to prevent unauthorized access to data, to ensure integrity of data, to provide continuity of service, and to prevent unintentional or intentional intrusion into user memory during operations. These considerations dictate the following:

1. Administrative security by means of custody logs, access logs, check out procedures, control of user numbers and access criteria, and control of Government account records.

2. Physical security to prevent unauthorized access to computer hardware or to records that provide control over data access. Protective measures must also be provided to ensure the integrity and consistency of the operation of the system and network in case of natural or man made disaster.

3. Technical security that provides:

(a) Password security at the operating system level.

(b) Both read and write protection at the file level.

(c) An on-line implementation of TOTAL that includes the following access provisions:

(1) Vendor must provide a method of passing TOTAL calls and data from multiple user–task coding areas through a single Data Manager coding area (and return).

(2) Vendor must provide a method for the Bureau of Naval Personnel to intercept, trap, check, and modify user TOTAL calls within the Data Manager's coding area. The code itself used to intercept, trap, and modify user TOTAL calls and data will be provided by the Bureau of Naval Personnel. This code will be

called the Data Manager's Security Code and will not be used in the Benchmark.

(3) Vendor must provide safeguards to prevent all TOTAL calls originating outside the Data Manager's Security Code from accessing the production data base until it has been passed within the Data Manager's Security Code.

(4) Vendor must provide a duplicate capability described in paragraphs (1.) through (3.) above, and in Appendix C, in order to test new Data Manager code and user application code against completely separate test data bases.

(d) Main memory protection must ensure the integrity of a user's area during operations.

4. Training of all contractor personnel is required to ensure knowledge of the security safeguards and procedures.

5. The proposal must include a detailed description of all security measures and procedures.

B. The Government retains the right to test and evaluate security procedures of the network and system at any time during the life of the contract. These evaluations may be made at any Navy site on the network or at the central computer site.

C. The Bureau of Naval Personnel will not develop and operate an advanced manpower and personnel management information system that does not meet the above security standards. Failure to maintain security of the system and network as evidenced in a system test or by unauthorized disclosure may be considered default of the terms of this announcement and/or lead to nullification of any charges for the duration that the condition exists.

D. The basic reference for security guidelines is: Federal Information Processing Standards Publication 31 (FIPS PUB 31), *Guidelines for Automatic Data Processing Physical Security and Risk Management*, JUNE 1974, U.S. Department of Commerce/National Bureau of Standards.

In addition, the RFP at page 143(a) contained recently published ASPR clauses (ASPR §§ 7–104.96, 7–2003.72, Defense Procurement Circular No. 75–5, November 17, 1975) which note, *inter alia*, that violations of the Privacy Act may result in civil liabilities or criminal penalties.

Tymshare principally has contended that the OS/MVT system proposed by COMNET lacks the basic design features necessary to insure the security of records and cites, *inter alia*, a National Bureau of Standards publication (NBSIR 76–1041, "Security Analysis and Enhancements of Computer Operating Systems") as evidencing the ability to deliberately or accidentally violate the security of the OS/MVT.

COMNET's July 26, 1976 letter to the Navy responded to Tymshare's arguments. COMNET pointed out that it had developed considerable modifications to the normal OS/MVT security features. Specifically, COMNET stated that it would provide a "full function security system" as opposed to merely the standard OS/MVT password data set protection system provided by the operating system. Also, COMNET stated that extensive modifications were made to the TOTAL Supervisor Call Routine, so as to insure system integrity. Further, COMNET asserted that its system provides memory and storage protection in all areas of the machine, including user areas and user data sets. Also, COMNET stated that it has been processing the Guaranteed Student Loan Program for the Department of Health, Education, and Welfare, and asserted that in this program, which involves conditions similar to the present procurement, security has

been maintained in full compliance with the Privacy Act (5 U.S.C. § 552a (Supp. IV, 1974)).

The Navy's position is that COMNET's proposal was carefully evaluated and was found to meet the requirements of the RFP. The Navy states that it has no doubts that COMNET can furnish a system which will meet the requirements of the Privacy Act.

In *PRC Computer Center, Inc., et al.*, 55 Comp. Gen. 60, 91-95 (1975), 75-2 CPD 35, we considered a question as to whether an OS/MVT operating system used on the IBM 370/168 CPU satisfied an RFP requirement that "The system shall provide for protection of user programs, the operating system, and the areas in which their code resides, from read or write access by other users." In reviewing this issue, in consultation with technical experts, our Office concluded that the succesful offeror's proposal failed to meet this material RFP requirement insofar as read protection was concerned. Since a similar issue appears to be involved in the present case, GAO staff members with technical expertise in this area have reviewed the compliance of COMNET's proposal with the RFP privacy and security requirements.

Initially, it must be noted that a number of the RFP requirements are stated in general terms. Where an RFP requires merely that offerors show familiarity with certain requirements, provide assurances that certain safeguards will be established, or provide a detailed description of proposed methods and procedures, the agency's determination that an offeror proposal shows a familiarity, or provides the requested assurances and descriptions, obviously involves a considerable degree of judgment. For instance, we note that the Privacy Act requires the establishment of appropriate administrative, technical and physical safeguards to protect the security and confidentiality of records (5 U.S.C. § 552a(e)(10)), but neither the act nor the implementing regulations specify design criteria or particular features and mechanisms to do this. Hence, insofar as the more general requirements are concerned—for example, that an offeror be familiar with the act's requirements—it would be extremely difficult to conclude that the agency's acceptance of an offeror's assurances in this respect has no reasonable basis.

Some of the RFP provisions are thus subject to interpretation as to what might constitute a minimally adequate offeror response. In this connection, it must also be noted that the state of the art in computer security is such that no vendor can provide absolute assurance that unauthorized access to information contained in a computer system will be precluded. However, we believe the RFP indicates that the Navy had determined that a reasonable degree of protection could be provided if the technical security specifications in section VII, *supra*, were met. We note that some of these provisions are stated in specific and

clearly mandatory terms. While we have examined the COMNET proposal's compliance with several of these provisions, the most important point involves RFP section VII.A.3.d., which provides that "Main memory protection must ensure the integrity of a user's area during operations."

We believe this requirement is open to only one reasonable interpretation, namely, that an offeror's hardware/operation system configuration must include "read" protection. After reviewing COMNET's proposal, we conclude that the hardware/operating system configuration it proposed—the OS/MVT operating on the IBM 360/65—cannot protect against read access to the main memory of the CPU without considerable modification. While COMNET's submissions in the protest proceedings state that it has made considerable modifications to the standard OS/MVT, after reviewing the COMNET proposal we do not believe the proposal demonstrates that the memory protection requirement has been met. Based upon this and our examination of the record of the Navy's technical evaluation of proposals, we believe the Navy's acceptance of the proposal in this respect lacked a reasonable basis, and amounted to an improper relaxation of a material security requirement without amending the RFP pursuant to ASPR § 3–805.4 to allow further competition on the basis of the relaxed requirement.

V. CONCLUSION

Since the Navy erred in accepting the COMNET proposal, which did not comply with a mandatory security provision, there is the question of what corrective action, if any, should be recommended. As noted *supra*, Tymshare protested, seeking the following alternative remedies, in order of preference: (1) reinstatement of its contract; (2) a resolicitation; or (3) non-exercise of the 2 option years.

Initially, reinstatement of Tymshare's contract is precluded, because Tymshare's proposal was unacceptable due to its failure to offer fixed prices.

Further, we do not believe that a resolicitation, as such, would be appropriate, because there is no indication in this case that the RFP is defective. However, it conceivably could be in the best interests of the Government to recommend that the Navy renew the competition by reopening negotiations with Tymshare and COMNET, awarding a contract to the successful offeror, and terminating for convenience COMNET's contract, if necessary.

In this connection, we understand that the estimated total price for the first year of the contract is about $1.8 million. It must be noted that the Navy has already incurred some costs due to its previous termination for convenience of Tymshare's contract. Tymshare has asserted that settlement of this termination will cost the Navy $495,987, but the

Navy considers this estimate to be unrealistically high. Also, COMNET has commenced performance of its contract. Termination for convenience of COMNET's contract would necessarily involve additional costs to the Government.

However, we believe that if Tymshare were the successful offeror in any renewal of competition, this would ameliorate the Government's liability in settling the previous termination of Tymshare's contract. On the other hand, if COMNET remained the successful offeror in a renewal of competition, the Government would be in no worse position in regard to settling the termination for convenience of Tymshare's contract.

Accordingly, we recommend that the Navy reopen negotiations with Tymshare and COMNET, obtain revised proposals, and either (1) award a contract to Tymshare (if it is the successful offeror) and terminate for convenience COMNET's contract, or (2) modify COMNET's contract pursuant to its best and final offer (in the event that COMNET remains the successful offeror in the renewal of competition). By letter of today, we are advising the Secretary of the Navy of our recommendation.

Since this decision contains a recommendation for corrective action to be taken, we are furnishing copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees of Government Operations and Appropriations concerning the action taken with respect to our recommendation.

In view of the foregoing COMNET's protest to our Office has been satisfied by the Navy's actions and is academic. Tymshare's protest is sustained.

[B-187627]

Transportation—Ocean Carriers—Liability—Damage, Loss, etc., of Cargo—Evidence

Prima facie case of liability of common carrier by water for goods shipped through Panama Canal is established when shipper shows that cargo was received in good order and condition at origin and arrived in damaged condition at destination. To escape liability, carrier must show that loss or damage was caused by an Act of God, the public enemy, inherent vice of the goods or fault of shipper, and that it was free of negligence.

Set-Off—Transportation—Property Damage, etc.—Set-Off Common Law Right

Government agency may exercise its common law right of setoff if prima facie case of carrier liability is established. Setoff may be exercised by the Government before liability is judicially established. A review of a setoff by the United States is within jurisdiction of the Court of Claims, 28 U.S.C. 1503 (1970).

Transportation—Bills of Lading—Government—Report of Loss, Damage or Shrinkage—Condition 7

Condition 7 in Government bill of lading constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must be instituted.

Set-Off—Authority—Common Law Right

The Government's common law right of setoff is not extinguished by 49 U.S.C. 66. The right of the Government to deduct from the payment of freight charges is not limited to overcharges.

In the matter of Sea-Land Service, Inc., January 14, 1977:

This decision is in response to a claim submitted by Sea-Land Service, Inc. (Sea-Land), for $91,665.40 in earned ocean freight which was withheld by means of setoff against a cargo damage claim of the United States. Sea-Land protests the Government's withholding of the sum equal to its cargo damage claim, and argues that the Government has no right of common law setoff.

Sea-Land, a common carrier by water, received for transportation in March 1972 two shipments of palletized, canned, dried nuts loaded into three Sea-Land containers. The shipments were transported from Brooklyn, New York, to the Defense Depot, Tracy, California, and to the Naval Supply Center, Alameda, California, under Government bills of lading (GBLs) Nos. F–2715761 and F–2715762. These shipments transited the Panama Canal and were delivered to the Government in California on April 20, 24, and 25, 1972. Both shipments were rejected by the consignee; rejection was predicated upon evidence of moderate to extensive rust (moisture damage) to the exterior of the cans, rendering the cargo unfit for military distribution.

The CBLs were issued by Sea-Land March 20 and 30, 1972, to cover the two shipments of edible nuts from Q & R Packing Co. (G & R) in Brooklyn, New York, for Aster Nut Products, Inc. (Aster), of Newark, New Jersey, a Government contractor.

The Defense Contract Administration Services Region (DCASR) for New York reports that in the process of canning, these nuts are packaged by Aster in the cans in a dry condition at room temperature. The cans are packed in the shipping cases at room temperature and then placed on pallets and shipped to G & R in closed vans. At G & R the shipping cases are taken off the prime contractor's pallets and placed on military pallets. All of this work is done indoors in a covered area and at room temperature.

G & R packed and sealed 34 pallets in Sea-Land's container #393971 on March 19, 1972, and the shipment was picked up by Sea-Land at G & R on March 20, 1972, under GBL No. F–2715761. The shipment was lifted aboard Sea-Land's S.S. *Baltimore*, which sailed

from Elizabeth, New Jersey, on March 24, 1972 (voyage 86W); it was delivered by Sea-Land's agent to the Tracy Defense Depot on April 20, 1972, where it was rejected to the carrier.

G & R packed 30 pallets in Sea-Land's container #33435 and 20 pallets in container #67774 on March 29, 1972, and the shipment was picked up by Sea-Land from G & R on March 30, 1972, under GBL No. F-2715762. The shipment was lifted aboard Sea-Land's S.S. *Seattle*, which sailed from Elizabeth, New Jersey, on April 3, 1972 (voyage 235W); it was delivered by Sea-Land's agent to the Alameda Facility Warehouse on April 24 and 25, 1972, where it was rejected to the carrier.

Listed below is the temperature and precipitation from March 16 through 20, 1972, at G & R, Brooklyn, New York, when the shipment moving under GBL No. F-2715761 was packed:

DATE	TEMPERATURE	PRECIPITATION
16 Mar 72	51°-36°	Rain
17 Mar 72	52°-38°	1.20%
18 Mar 72	51°-41°	.02%
19 Mar 72	53°-40°	.20%
20 Mar 72	51°-36°	.20%

Listed below is the temperature and precipitation from March 27 through 31, 1972, at G & R, Brooklyn, New York, when the shipment moving under GBL No. F-2715762 was packed:

DATE	TEMPERATURE	PRECIPITATION
27 Mar 72	46°-31°	No Rain
28 Mar 72	48°-27°	No Rain
29 Mar 72	58°-35°	No Rain
30 Mar 72	43°-40°	No Rain
31 Mar 72	46°-40°	No Rain

The record discloses that U.S. Department of Agriculture (USDA) Inspectors at origin accepted the shipments as meeting the contract requirements including packaging, packing, and condition at the time of shipment. Furthermore, the USDA examination worksheets reveal that all cans were found to have no defects and were accepted by the Government without exception. And in a letter dated June 27, 1972, Sea-Land agrees that "the inspection by the Department of Agriculture . . . would appear to rule out [preshipment damage.]"

A Discrepancy in Shipment Report dated June 30, 1972, prepared at destination by the consignee on GBL No. F-2715761, indicates that:

> Shipping containers (cases) appeared to have been water-soaked. Cases were wrinkled and damp. Cans showed deep pitting rust especially in top two (2) layers of each pallet.

A Discrepancy in Shipment Report dated May 1, 1972, prepared at destination by the consignee on GBL No. F-2715762, indicates that:

Inspection by U.S. Army Veterinary Detachment determined that the overwhelming majority of cans were corroded from water. Many cases were damp and beginning to mildew. The entire shipment of 2000 cases of mixed nuts was rejected.

* * * * * * *

Apparent Cause: Water Soaked in Transit.

The shipments were rejected by the military because recanning, reconditioning and repacking of the product by the Government was not feasible since the operation would have been very costly and the yield of usable nuts unpredictable. In a letter dated May 4, 1972, to G & R, Sea-Land stated that "The military has advised they cannot use the cargo due to the necessity for them to store it approximately 9 months prior to distribution . . . ."

A clean bill of lading is prima facie evidence that a shipment was received at origin in good order and condition. See *States Marine Corp. of Delaware* v. *Producers Coop. Packing Co.*, 310 F.2d 206, 211 (9th Cir. 1962). At common law, a common carrier by water was responsible for the safe arrival of the cargo, unless the loss or damage was caused by an Act of God or of the public enemy, or by inherent vice of the goods or the fault of the shipper, and even when the loss was caused by one of these exceptions, the carrier had to be free from negligence. *Propeller Niagara* v. *Cordes*, 62 U.S. (21 How.) 7, 23 (1858). When the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that the cause would not have produced the injury but for the carrier's negligence in failing to guard against it. *Schnell* v. *The Vallescura*, 293 U.S. 296 (1934). However, when the cause for the injury for which the carrier is prima facie liable is not shown to be an excepted peril, and a cargo which had been received in good condition is damaged by causes unknown or unexplained, the carrier is subject to the rule applicable to all bailees that such evidence makes out a prima facie case of liability. *The Vallescura*, *supra*, at 305.

Sea-Land contends that the damage to the shipments transported under GBL No. F–2715761 and GBL No. F–2715762 was caused by an inherent vice, i.e., condensation. More precisely, in a letter dated June 27, 1972, to the Department of the Army, Sea-Land states that:

A thorough survey has established that the cans were wet but that the cases had not been externally wetted. Condensation losses of this type occur in rare, freakish situations when canned goods items are loaded under unusually humid conditions and then subjected to sudden chilling due to temperature change. It takes an unusual combination of the above factors to accomplish such internal damage and there is no practical way to guard against such an occurrence other than to avoid packing and stowing under such conditions when unusually warm moist air is present. Once loaded, of course, it is thereafter impossible to control the onset of any sudden temperature drop. It is unlikely that an accident of this type would repeat in the near future.

The record establishes that the cans were in good order and condition upon receipt at origin. This fact is documented by the USDA examination of the cargo prior to shipment and by the clean bills of lading. Furthermore, the record strongly indicates that the climatic conditions existing at Aster and G & R when the nuts were packed in cans and cases and loaded in the containers were not conducive to the creation of condensation. Therefore, Sea-Land's assertion, "that losses of this type occur . . . when canned goods items are loaded under unusually humid conditions and then subjected to sudden chilling due to temperature change," is questionable.

While Sea-Land asserts that condensation (cargo sweat) caused the damage, and while this conclusion is stated in survey reports submitted by Sea-Land, other evidence in the record indicates that the cartons were soaked during transit and showed signs of mildew. Furthermore, the Department of the Army states in its administrative report that:

> . . . the carrier's personnel did state that they are having and will have, with the present equipment, problems of condensation. . . . The carrier was fully aware of the nature of the commodity and the shipment was made without exceptions.

Where there is a conflict between contentions of the carrier and the report of the administrative agency, the rule of this Office is to accept the report of the administrative agency as correct in the absence of conclusive evidence to the contrary. 51 Comp. Gen. 541, 543 (1972). In any event, since the goods were delivered to the carrier in good condition and arrived at destination in damaged condition, a prima facie case of carrier liability has been established and Sea-Land has not rebutted it. See *The Vallescura*, *supra*, at 305.

Sea-Land argues that the decisions in *United States* v. *Isthmian Steamship Co.*, 359 U.S. 314 (1959), and in *Grace Line* v. *United States*, 255 F. 2d 810 (2d Cir. 1958), preclude the Government from exercising its common law right of setoff. Essentially, Sea-Land's argument is as follows:

> It is abundantly clear that the position of the Government Finance Center is that, by withholding and applying ocean freight earned and due Sea-Land against our alleged indebtedness for cargo damage loss, there results a discharge of "mutual debts" which constitutes "payment". In this respect, the General Accounting Office is urged to review the decision by the Court of Appeals for the Second Circuit in *Grace Line*, *supra*, wherein the Court stated (255 F. 2d at 813):
> "In other words, the attempted set-off must be a legally enforceable claim; and the fact that the Comptroller General has decided the claim in favor of the Government *ex parte* by withholding the amount thereof from a payment justly due to a creditor of the United States neither constitutes a payment of and discharge of the debt nor does it stop the running of the applicable Statute of Limitations against the government claim in alleged satisfaction of which the Comptroller General takes this unilateral action. Here the period of limitations had plainly run."

Both *Isthmian* and *Grace Line* were suits in admiralty which rested partly on the proposition that admiralty practice did not per-

mit private parties to defend by setting off claims arising out of separate and unrelated transactions between the parties. The courts reasoned that the Government could not offset against the libelant's claim an amount owing to the Government under an earlier unrelated transaction. With the merger of the admiralty rules of practice into the Federal Rules of Civil Procedure in 1966, Rule 13 of the Federal Rules of Civil Procedure permits the assertion of claims arising from independent transactions as permissive counterclaims. Therefore, at the judicial level, the Government's cargo damage claim against Sea-Land could be asserted as a permissive counterclaim. Both courts also held that the setoff of one claim against another does not constitute "payment" of that creditor's claim against the United States under 31 U.S.C. § 71 (1970). (This statute gives the General Accounting Office the power to settle and adjust all claims by or against the United States.) While we agree that a setoff of one claim against another does not constitute "payment" under 31 U.S.C. § 71, the Supreme Court has recognized the right of a Government agency to exercise its common law right of setoff. A review of a setoff by the United States is within the jurisdiction of the Court of Claims. 28 U.S.C. § 1503 (1970).

In *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), the Supreme Court states at 239–40:

> The government has the same right "which belongs to every creditor, to apply the unappropriated moneys of his debtor in his hands, in extinguishment of debts due him."
>
> * * * * * * *
>
> [The power of set off is given] to the Comptroller General, subject to review [by the Court of Claims.]

Furthermore, the United States may make a setoff before judgment. See *United States* v. *American Surety Co. of N.Y.*, 158 F.2d 12 (5th Cir. 1946).

Sea-Land asserts that the Government's cargo damage claim is time barred and therefore under *Grace Line* is not a "legally enforceable" claim. Sea-Land states that:

> . . . Having failed to prove judicially its claim for cargo damage within the statutory period of limitations, Sea-Land respectfully submits that the $91,665.40 of earned ocean freight, held as "security" against the Government's time-barred claim, be returned forthwith.

Apparently Sea-Land is relying on the one year time limitation for commencement of legal action contained in its bill of lading. This bill also incorporates the Carriage of Goods by Sea Act which contains a similar provision. Consequently Sea-Land argues that the Government may not set off its cargo damage claim against the carrier's current ocean freight billings.

In *Grace Line*, the goods moved under a commercial bill of lading which provided that "the carrier shall be discharged from all liability in respect of . . . every claim with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered . . . ." The bill also incorporated by reference the Carriage of Goods by Sea Act, which included a similar time bar.

The cargo involved in this case moved under Government bills of lading which, on the back under condition 7, provide that:

> In case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carrier or the period within which claim therefor shall be made or suit instituted.

Condition 7 in the Government bill of lading constitutes a waiver of the limitation period in the commercial bill of lading. See *United States* v. *Gulf Puerto Rico Lines, Inc.*, 492 F.2d 1249 (1st Cir. 1974). As a result, the Government is not subject to a one-year limitation within which it may commence a suit for loss and damage, and to that extent the holding in *Grace Line* is no impediment to the setoff. Moreover, in an action against the United States any claim of the United States "that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset . . . ." 28 U.S.C. § 2415(f) (1970). Therefore, in a suit by Sea-Land, the cargo damage claim against Sea-Land, even if considered time-barred, *could be* asserted against it by way of offset. Thus, unlike the claim in *Grace Line*, this claim is "legally enforceable" and therefore the proper subject of common law setoff under *Munsey Trust*.

Sea-Land also argues that the right of the Government to make any deduction from the payment of freight charges is limited to overcharges defined in Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C. § 66. However, the Government's common law right of setoff is not extinguished by that statute. *Burlington Northern, Inc.* v. *United States*, 462 F.2d 526 (Ct. Cl. 1972).

We note, however, that the Government's setoff of the $91,665.40 claim included $1,075 in freight charges collected by Sea-Land on the shipment moving under GBL No. F-2715761. Sea-Land clearly is entitled to these freight charges because it delivered the cargo to desetination. See *Alcoa Steamship Co.* v. *United States*, 338 U.S. 421 (1949); *United Van Lines, Inc.* v. *United States*, 448 F.2d 1190 (D.C. Cir. 1971).

In these circumstances, Sea-Land is entitled to freight charges of $1,075, if otherwise correct; the balance of the claim must be and is disallowed.

[B-186655]

Bids—Invitation for Bids—Cancellation—Unbalanced Bids

Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied, since where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs.

Estoppel—Elements

Claim based on estoppel is denied since party to be estopped must know all facts at time that party induced claimant to act to its detriment and Government was unaware that solicitation contained erroneous estimates when it informed claimant of contract number and requested payment and performance bonds.

Contracts—Protests—Allegation of Improper Rescission—Not Supported by Record

Claim based on alleged improper rescission is denied since acts of assigning contract number and requesting payment and performance bonds at least 7 weeks prior to commencement of contract period is not action a reasonable bidder would act on without obtaining confirmation in writing. Actions taken by Air Force were merely preparatory to contract and, without confirmation in writing, claimant acted at its own peril.

In the matter of the Trataros Painting and Construction Corporation, January 18, 1977:

Trataros Painting and Construction Corp. (Trataros) protests against the cancellation of solicitation No. F28609-76-09053 and rescission of the alleged contract arising from this solicitation issued by the Department of the Air Force (Air Force), McGuire Air Force Base, New Jersey, for the painting of family living quarters.

The solicitation was issued on March 8, 1976, and bid opening, as amended, was scheduled for April 14, 1976. The solicitation contemplated a requirements-type contract covering a 12-month period.

After bid opening Trataros was informed by the buyer that it was low bidder and that notice would be forthcoming if it was to receive the award. On April 20, 1976, the buyer advised Trataros that a contract number had been assigned and instructed Trataros to obtain payment and performance bonds in the required sums.

On April 22, 1976, the base procurement office received a protest from another bidder questioning item No. 3 of the solicitation relating to the painting of closet interiors. This bidder took issue with the estimates for interior closet areas, but its principal argument was that the award should be based on unit prices rather than a lump-sum aggregate price. Trataros was notified of this protest by the procurement office on April 26, 1976. The protest was denied, and the bidder

was informed by letter dated May 19, 1976, that the contract would be awarded on the basis of unit prices quoted by each bidder.

By letter dated May 21, 1976, Trataros was requested to verify its bid price. It was informed that its bid appeared low in comparison with the other bids submitted and with the Government estimate. Trataros, on May 22, 1976, verified its bid and stated that the unit prices as submitted were correct.

On May 27, 1976, orally and in writing, all bidders were advised of the contracting officer's decision to cancel the solicitation on the basis that the solicitation as released contained substantial erroneous quantities relating to the actual amount of closet area to be painted, thereby inadvertently permitting bidders to submit unbalanced bids. The Air Force states that review of the information contained in the solicitation indicates that cancellation is clearly in the best interest of the Government. Trataros was further advised that its alleged contract was not consummated and that authority to proceed as requested could not be authorized.

By letter dated June 2, 1976, Trataros protested against the cancellation of the solicitation on the basis that specifications had been the same for the preceding 3 years and, therefore, the amount of closet area to be painted was not erroneous. It is also Trataros' position that a contract had been consummated and improperly rescinded. By letter dated August 20, 1976, after receipt of the agency report, Trataros has stated that a cogent and compelling reason is lacking to justify cancellation of the solicitation. Trataros further contends that the protest by the other bidder, which was denied and which challenged item No. 3, the item which was subsequently proven to contain erroneous estimates, was significant since this was the eventual reason for cancellation of the solicitation. In addition, Trataros has requested payment in the amount of $41,875 for reimbursement of alleged damages and expenses it suffered when the solicitation was cancelled. Finally, Trataros claims the Government is estopped to deny the existence of a binding contract.

It is the Air Force's position that: (1) the Trataros bid is mathematically unbalanced; (2) the erroneous Government estimates contained in item No. 3 of the solicitation constitute adequate justification for canceling the solicitation; and (3) the contract with Trataros was never consummated and, therefore, the protester is not entitled to any compensation.

In our decision B–168205(1), June 30, 1970, unbalanced bidding is described as follows:

> * * * The term "unbalanced" * * * is applied to bids on procurements which include a number of items as to which the actual quantities to be furnished are

not fixed, in which a bidder quotes high prices on items which he believes will be required in larger quantities than those used for bid evaluation, and/or low prices on items of which he believes fewer will be called for. * * *

Our Office has recognized the two-fold aspect of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect—material unbalancing—involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. See *Mobilease Corporation*, 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

In the Trataros bid, substantially all of its aggregate price was on item No. 3, the closet interiors, which was only one of 10 separate items on the bidding schedule. This was done with the expectation, according to Trataros, that "* * * the paintable closet area was usually proportionate to the rest of the areas." We have been informed that in preceding years, the estimated area for closets was listed on the schedule as 75,000 square feet. This year it was decided that the repainting would be limited to selected portions of rooms that were judged to be in need of it rather than painting entire rooms including trim and closets. Accordingly, the specifications were changed from prior years so that all surfaces would not have to be painted. If inspection showed that only a certain part of the room needed painting, that is all that would be reflected in the work order. It appears that Trataros ignored this change and concentrated its bid price on one item of the schedule. While contract award would be on the basis of an evaluation of aggregate bid prices, the payment for work done would be strictly on separate item prices.

There is reasonable doubt that an award to any mathematically unbalanced bidder would result in the lowest cost to the Government. There is a substantial variation between the solicitation's first estimate and the succeeding estimate. This in itself creates a substantial doubt that an award to any mathematically unbalanced bid would result in the lowest cost. As we stated in *Edward B. Friel, Inc.*, 55 Comp. Gen. 231 (1975), 75-2 CPD 164:

* * * In other words, where the IFB's estimates are not reasonably accurate, there is a strong indication *per se* that material unbalancing is present. In this regard, it must be noted that whatever estimated quantities are used in evaluating the bids are, of course, precisely that—estimates of what may be ordered in the future under the contract. There are no "actual requirements" on which to evaluate bids, and the substitution of one estimate for another merely reflects the agency's best judgment, at a given point in time, of what may transpire in the future and what ultimate costs the Government may incur.

Based on the foregoing, we agree with the Air Force's position that the Trataros bid was mathematically unbalanced. Since it also appears that the Government would not be getting the lowest cost, it is our view that the Trataros bid was also materially unbalanced.

Armed Services Procurement Regulation § 2–404.1(b)(viii) (1975 ed.) provides that cancellation of a solicitation is permitted where, for compelling reasons, it is clearly in the best interests of the Government to do so. We have sustained the cancellation of an invitation where, after bid opening but prior to award, it has been determined that the original specifications no longer serve the Government's actual needs. See 49 Comp. Gen. 211 (1969); *Cottrell Engineering Corporation*, B–183795, September 22, 1975, 75–2 CPD 165.

In the instant case the deficiency in the Government estimates inadvertently permitted bidders to submit unbalanced bids. Our Office has held that where examination of the estimate discloses that it is not reasonably accurate the proper course of action is to cancel the solicitation and resolicit based upon a revised estimate. *Edward B. Friel, Inc.*, 55 Comp. Gen. 231, *supra*.

In a new solicitation for this procurement a revised bidding schedule has been adopted. The schedule now reflects the best estimate of needs for the projected contractual period. The area for closet interiors has been reduced from 75,000 square feet to 5,500 square feet.

Based on the above, we agree that there was a compelling reason for the Air Force's decision to cancel the solicitation and resolicit based upon a revised estimate which reflects the agency's actual needs.

In regards to the protest by another bidder, the contracting officer did not find that the estimates for interior closet areas were reasonable. It was explained to the protesting bidder that the assumption that all closets would be painted was incorrect and that the total of all extended unit prices would be the basis for award. This protest did lead to a review of the estimates in the solicitation by agency personnel. It was concluded that the existing estimates did not reflect actual anticipated needs, and the decision was made to cancel the solicitation.

We do not agree with the protester that the Government is estopped to deny the existence of a legally binding contract. In *Emeco Industries, Inc.* v. *United States*, 202 Ct. Cl. 1006 (1973), the Court of Claims reasserted the four elements of estoppel propounded in *United States* v. *Georgia-Pacific Company*, 421 F. 2d 92 (9th Cir. 1970), requiring that:

1) the party to be estopped must know the facts;
2) the party must intend that its conduct shall be acted upon, or must act so that the party asserting the estoppel has a right to believe that the conduct is so intended;

3) the claimant must be ignorant of the true facts; and
4) the claimant must rely on the other's conduct to his injury.

We do not believe that all 4 elements exist in the instant situation to justify estoppel. At the time that Trataros was informed that it was the low bidder and was requested to execute the payment and performance bonds, the Government did not know all the facts. As of April 26, 1976, the date of the Government's actions, the procuring activity was not aware of the true facts. It was not until five weeks later that the Air Force discovered that its estimates were erroneous. The key to discovering the erroneous estimates was the protest by another bidder, which led to a review of the estimates, and this protest was not decided until May 19, 1976.

Our Office has considered the issue of estoppel in *Fink Sanitary Services, Inc.*, 53 Comp. Gen. 502 (1974), 74-1 CPD 36. In that case, we stated that the agency's actions in giving a contract number to the apparent low bidder just 6 days prior to commencement of the contract period is an action which a reasonable bidder has a right to act on. This situation is easily distinguishable from the instant case. We have been advised that the commencement of the contract period was not to begin until mid-June, a period of at least 7 weeks from the time Trataros was given the contract number. Therefore, the acts of assigning a contract number and requesting the protester to obtain payment and performance bonds 7 weeks prior to commencement of the contract period is not, we believe, an action which a reasonable bidder has a right to believe was intended for it to act upon without obtaining a written confirmation that it was the intended contractor. The actions taken by the Air Force were merely preparatory to a contract, and Trataros was acting at its own peril by proceeding without formal written notification that award would be made to it.

Accordingly, the protest and the claim for damages are denied.

[B-136318]

Departments and Establishments—Services Between—Reimbursement—Actual Cost Required—Overhead Included

Administrative overhead applicable to supervision by Department of Commerce of service provided to other Federal agency is required to be included as part of "actual cost" under section 601 of Economy Act, 31 U.S.C. 686 (1970), and must therefore be paid by agency to which service is rendered. Above is applicable whether amounts collected for Departmental overhead are deposited to miscellaneous receipts in General Fund of Treasury or credited to Department of Commerce General Administration appropriation.

In the matter of the Commerce Department—inclusion of departmental overhead under 31 U.S.C. 686 (1970), January 21, 1977:

The Assistant Secretary for Administration, Department of Commerce, requested our decision whether the Department is required to in-

clude administrative overhead applicable to Departmental supervision (Departmental overhead) as part of actual cost, to be recovered from another agency for which the Department performs services under the authority of section 601 of the Economy Act of June 30, 1932, as amended (31 U.S.C. § 686 (1970)). He also asks if our decision would be the same regardless of whether amounts collected for Departmental overhead are deposited to miscellaneous receipts in the General Fund of the Treasury or credited to the Department of Commerce General Administration appropriation. Finally, the Assistant Secretary asks whether the Department would be improperly augmenting the appropriations of agencies for which it performs services if it did not charge for Departmental overhead.

The rendering of services by one executive department or independent establishment to another is governed by 31 U.S.C. § 686(a) (1970), which provides in pertinent part:

> Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon the furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau, or office as may be requisitioned; but proper adjustments on the basis of the actual cost of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned * * *.

We have held that "actual cost" as used in the statute includes overhead and other indirect expenses. In 32 Comp. Gen. 479, at 480 (1953), we said:

> This language [of section 686(a)] was discussed in 22 Comp. Gen. 74 and it was there held that the statute required reimbursement to be made "on the basis of the actual cost of performing the service 'as may be agreed upon' by the agencies concerned." Such cost was construed in the said decision to include overhead or indirect costs—"items which commonly are recognized as elements of cost, notwithstanding such items may not have resulted in direct expenditures * * *." Also, it was stated therein that "the question as to the 'proper adjustments' to be made as reimbursement for services rendered under the terms of the applicable statute is one primarily for administrative consideration, to be determined by agreement between the agencies concerned."
>
> The statute as thus construed clearly establishes the principle that payment for the services shall be upon a cost basis and such principle is binding upon both the procuring and requisitioned agency in fixing the charges to be billed and paid. * * *

The question now presented arises because, according to the Assistant Secretary, while a headnote to 38 Comp. Gen. 734 (1959)

> * * * seems to indicate that agencies have discretion in determining which, if any, items of indirect cost should be included in the price billed to another agency for services furnished under the Economy Act, neither that opinion nor any other that we could find, would seem to justify that statement * * *.

Language in a headnote is, of course, only a paraphrase or digest, and cannot be relief upon in preference to the text of a decision. The decision in 38 Comp. Gen. 734 does say that depreciation expense in interagency transactions under section 601 is "* * * an element of cost which properly *may* be included in billings and recovered. * * *" (At 739, italic supplied.) This language, standing alone, might be understood to make recovery of indirect expenses such as depreciation permissive rather than mandatory, but it should be considered in the proper context. The question then before this Office was whether a proposal by the Department of Commerce to bill other agencies for depreciation associated with services provided under the Economy Act was proper, and the answer, couched in narrow terms, was that the proposal was proper. That is, the question now before us—whether the charge for indirect expenses was mandatory—was not expressly raised and was not answered by 38 Comp. Gen. 734.

Similarly, in 22 Comp. Gen. 74 (1942), the narrow question was whether a voucher for payment of another agency's bill for services provided under section 601 of the Economy Act could properly be certified for payment where the amount to be certified included indirect costs, not associated with direct expenditures by the billing agency. We held that "* * * the performing agency properly may be reimbursed * * * ," without expressing any opinion as to whether the charge for the indirect costs was mandatory or not. Compare, in this connection, the language of 32 Comp. Gen. 479, quoted *supra.*

We now take this opportunity to resolve any doubt which may exist as a result of the language of our earlier decisions and of the headnote to 38 Comp. Gen. 734. Effective compliance with the reimbursement provision of 31 U.S.C. § 686(a) is only achieved when all significant elements of cost are recognized and recovered in any transaction under that section. If overhead expense is significant, then like other elements of costs it should be recognized and recovered. The recognition of these costs is necessary so that the performing agency and the ordering agency will know the costs of their operations. Also, the requirement that prices of the performing agency be based on full costs affords the ordering agency a financial measurement for determining whether to deal with one or another Government agency, procure the services elsewhere, or forego the undertaking entirely. Prior decisions are overruled to the extent they are inconsistent with this conclusion. Moreover, as noted in the submission, this would make the Federal reimbursement procedures under the Economy Act consistent with the practices and policies applicable to provision of goods and services to non-government recipients under the user charge statute, 31 U.S.C. § 483a, which specifically requires the provider

agency to take into account both direct and indirect costs in prescribing fees and charges.

Unless exempted by law, agencies which heretofore have excluded significant indirect costs from their billings under section 601 of the Economy Act and similar laws should revise their practices with respect to any agreements entered into hereafter under such law. However, in recognition of the fact that this will represent a departure from existing, previously acceptable practice, this decision will operate prospectively. That is to say, reimbursement may be made, with respect to agreements entered into prior to this decision, according to the terms thereof and present agency policies, whether or not indirect costs will be recovered.

In view of our conclusion that the overhead cost is required to be recovered, the determination of whether a failure to charge for overhead cost represents an augmentation of the appropriation of a user agency is unnecessary.

Finally, we have been asked whether our decision concerning recovery of indirect overhead costs is affected by the choice of the Department of Commerce to deposit funds collected for Departmental overhead to miscellaneous receipts in the General Fund of the Treasury rather than crediting them to the General Administration appropriation.

31 U.S.C. § 686(b) provides in pertinent part as follows:

> Amounts paid as provided in subsection (a) of this section shall be credited, (1) in the case of advance payments, to special working funds, or (2) in the case of payments other than advance payments, to the appropriations or funds against which charges have been made pursuant to any such order, except as hereinafter provided. * * * Such amounts paid shall be available for expenditure in furnishing the materials, supplies, or equipment, or in performing the work or services, or for the objects specified in such appropriations or funds. Where materials, supplies, or equipment are furnished from stocks on hand, the amounts received in payment therefor shall be credited to appropriations or funds, as may be authorized by other law, or, if not so authorized, so as to be available to replace the materials, supplies, or equipment, except that where the head of any such department, establishment, bureau, or office determines that such replacement is not necessary the amounts paid shall be covered into the Treasury as miscellaneous receipts.

The statute thus represents an exception to the rule of 31 U.S.C. § 484 (1970), which requires generally that all moneys received for the use of the United States be paid into the Treasury. The purpose of the exception is to allow agencies to perform services for one another without, in effect, suffering a financial penalty.

It is not clear why the Department has chosen to deposit amounts received for departmental overhead in the Treasury as miscellaneous receipts, rather than to credit these amounts to the appropriation for general administration of the Department, as it formerly did. The Assistant Secretary says only that the latter procedure was found

more practicable, "for budgetary considerations." We note, however, that since the cost of departmental overhead does not result in direct expenditures or identifiable charges against the appropriation for general administration, the Department's ability to perform work for other agencies without diminishing the funds available to it for its own activities is not impaired by depositing the departmental overhead charges in miscellaneous receipts.

Accordingly, although the procedure adopted by the Department - depositing amounts received in reimbursement for Departmental overhead in miscellaneous receipts—is not expressly authorized by 31 U.S.C. § 686(b), we cannot say that the Department has acted improperly in adopting it. In any event, in response to the third question, our decision concerning whether the requirement to collect actual costs includes indirect costs is not affected by whether the amounts collected are deposited in the Treasury or not.

[B-183784]

Claims—Mobile Home Insurance—Set-Off—Past Due *v.* Future Premiums

As stated in 55 Comp. Gen. 658, claims under mobile home loan insurance pursuant to 12 U.S.C. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default in loan occurred while premium payments were current. However, in accordance with applicable regulations, lender is required to continue to pay insurance premiums up to date claim is filed with Department of Housing and Urban Development (HUD) rather than date of default, and setoff of this amount against allowable claims is appropriate. 55 Comp. Gen., *supra*, clarified.

Housing and Urban Development Department—Loans and Grants—Mobile Home Loan Insurance—"In Advance" Premiums

Although payment of insurance premiums in advance is required in order to maintion of lender that cannto be terminated prior to end of term of underlying 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly.

In the matter of a request for reconsideration of decision 55 Comp. Gen. 658 (1976), involving National Housing Act mobile home loan insurance, January 24, 1977:

This decision is in response to two separate requests from officials of the Department of Housing and Urban Development (HUD) for our further views with respect to our decision of January 23, 1976, 55 Comp. Gen. 658, concerning the payment of insurance premiums, and the legal ramifications of delinquencies in insurance premium pay-

ments, with respect to mobile home loans issued under section 2, title 1, of the National Housing Act, as amended, 12 U.S.C. § 1703 (1970). Since the requests are closely related, essentially constituting requests for reconsideration and/or clarification of our decision of January 23, 1976, we will combine our responses into one decision. However, for reasons of clarity, each request will be dealt with separately herein.

In our January 23 decision we held that timely payment of required premiums is a prerequisite to insurance coverage for mobile home loans under 12 U.S.C. § 1703 and the implementing regulations. Accordingly, we concluded that HUD could not honor insurance claims with respect to which premium payments were not current either at the time of loan default or at a time when the lender had reason to believe that loan default was imminent. With respect to the collection of unpaid insurance premiums, we said that past due premium charges may be set-off against otherwise allowable claims if the lending institution agrees to such an action or, alternatively, that all remaining insurance coverage for the lender should be cancelled for non-payment of the required premiums. We indicated, however, that in neither event would the set-off of future premiums be appropriate. Finally, we recommended that the Secretary of HUD consider amending the current HUD regulations in order to avoid any recurrence of this situation by setting out the legal effect of a failure by an insured lending institution to pay the required insurance premiums in advance, as required by the statute.

In the initial request for reconsideration of this decision from Mr. John W. Kopecky, HUD Assistant General Counsel, the question was raised as to "* * * whether the Secretary is authorized to provide that an insured may 'terminate' insurance coverage simply by failing to remit insurance premiums when due * * *." This issue will be fully discussed in the latter portion of this decision.

Subsequently, we received a letter from Mr. B. C. Tyner, Authorized Certifying Officer, HUD, requesting our advice as to the propriety of certifying a voucher presented to him in the amount of $2,934.02 covering a claim by the First Colonial Life Insurance Company, the same lender that was involved in the original decision. The voucher covers a claim on a loan made by First Colonial on June 1, 1972, for the purchase of a mobile home. The loan was made and submitted to HUD for insurance in accordance with 12 U.S.C. § 1703 and regulations issued pursuant thereto, 24 C.F.R. §§ 201.501, *et seq.* (1976).

As explained in the certifying officer's letter to us, the premium on the loan was current at the time of default by the borrower on September 1, 1973, but was delinquent and unpaid when the claim was actually filed by the insured lender on October 25, 1974. According to the submission, the instant question as to the propriety of honoring this claim

has arisen as a result of what we said in the following paragraph from our decision of June 23, 1976:

> Turning to the specfic claim accompanying the instant submission, as noted previously, default occurred (June 1, 1973) well before the lender became delinquent in its premium payments (September 1, 1974), even though the claim was actually filed (September 20, 1974) after the first nonpayment of premiums. Accordingly, this particular loan was covered by insurance at the time of default, and may be honored if otherwise proper. The certifying officer's submission to us does not describe the precise timing of the other pending claims by First Colonial, which should, of course, be disposed of in accordance with the conclusions expressed herein.

The certifying officer who submitted this question to us apparently believed that this language necessarily conflicted with the applicable regulations set forth in 24 C.F.R. § 201.640, which have been consistently interpreted by HUD as requiring that an insured lender continue to pay insurance premiums *up to the date of claim* without regard to whether the loan in question was current or in default. In our January 23 decision we were primarily concerned with the question of whether insurance coverage could remain in effect where the lending institution failed to pay its insurance premium "in advance" as required by the statute. We determined that payment of the required premiums "in advance," albeit on an annual basis (as prescribed by the regulations), was a prerequisite to continued insurance coverage. Accordingly, we concluded that claims could only be allowed for those loans that went into default while premium payments were still current, but would have to be disallowed when the default occurred or became imminent at some time after the premium delinquency arose. Thus, the language from that decision which was specifically quoted in the certifying officer's submission actually stands for the proposition that the particular claim involved there could be honored even though it was actually filed after the first nonpayment of premiums since the underlying loan was covered at the time the default that led to the claim occurred.

The certifying officer's primary concern is that the lender should be required to continue to pay insurance premiums up to the date the claim is filed rather than the date of default. We do not disagree with this conclusion. The applicable regulatory provisions, set forth at 24 C.F.R. § 201.640, provide as follows:

> *Refund or Abatement of Insurance Charge*
>
> An insured shall be entitled to a refund or abatement of insurance charges only in the following instances:
>
> (a) Where the obligation has been refinanced, the unearned portion of the charge on the original obligation shall be credited to the charge on the refinanced loan.
>
> (b) Where the obligation is prepaid in full or an insurance claim is filed, charges falling due after such prepayment or claim shall be abated.
>
> (c) Where a loan (or a portion thereof) is found to be ineligible for insurance, charges paid on the ineligible portion shall be refunded. Such refund shall be made, however, only if a claim is denied by the Commissioner or the ineligibility is reported by the insured promptly upon discovery. In no event shall a charge be refunded on the basis of loan ineligibility where the application for refund is made after the loan has been paid in full.

In our prior decision, we noted that since this provision provides that insurance premiums falling due after the filing of an insurance claim are abated, "there would be no past due premiums to set-off on loans which went into default while premium payments were current and for which insurance claims are now pending with HUD." We did not intend to suggests that an insured lending institution was relieved of its obligation to continue to pay insurance premiums in the interval between the date of default and the date the claim was filed. We believe that the meaning of 24 C.F.R. § 201.640 is clear, *i.e.*, that only the filing of an insurance claim with HUD, rather than the mere default by the borrower, abates premium charges. However, where premium payments are current at the time of default, we do not believe that nonpayment of premiums after default but before filing of a claim defeats the validity of the claim itself. See 43 Am. Jur. 2d, Insurance, § 621, at 629–630, which states the general rule that:

> * * * If the premium or assessment is not due until after a loss has occurred, failure to make payment thereof does not work a forfeiture of the policy.

In view of the foregoing, the proper procedure to follow for a claim such as the one here presented by the certifying officer is to honor the claim but set off against it unpaid premiums attributable to that claim arising between default and the date of filing of the claim, pursuant to the Government's customary right of set-off. *See e.g.*, 41 Comp. Gen. 178 (1961); 28 *id.* 543 (1949), and cases cited. Accordingly, the voucher presented may be paid, if otherwise correct, upon set-off of the appropriate premium amounts. Our decision of January 23, 1976, *supra*, is hereby clarified to the extent that it might be read to suggest a contrary result.

Finally, we note that although it appears on the basis of the original submission from HUD that First Colonial was and apparently still is involved in a bankruptcy proceeding (we have no precise information as to First Colonial's current status), we do not believe that this significantly affects the Government's right of set-off. In this regard 11 U.S.C. § 108(a) (1970) specifically provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." Although this section has been held not to be self-executing, we believe that HUD would certainly have the right before paying any claim to withhold an amount equivalent to all unpaid premiums due from a lender between the date of default and the date the claim is filed, pending an adjudication by the bankruptcy court as to the propriety of a final set-off of this amount.

Turning to the request from Mr. Kopecky, a different issue, although one that is related to the certifying officer's request, is involved. The

certifying officer was primarily concerned with the insured's legal obligation to continue to pay insurance premiums on defaulted loans until such time as claims thereon are actually filed. Mr. Kopecky's submission, on the other hand, suggests that lending institutions should not be permitted to unilaterally terminate their insurance coverage and their reciprocal obligation to continue to pay insurance premiums on loans that have not gone into default merely by failing to pay such premiums as they become due even when the real possibility exists that no additional insurance coverage will be forthcoming and any new claims could not, therefore, be honored. As stated in our decision of January 23, 1976, that possibility exists because of the statutory limitation in 12 U.S.C. § 1703(a) that insurance granted to a lending institution thereunder not exceed 10 percent of its eligible loans. To implement this provision, HUD regulations provide for the establishment of a general insurance reserve for each lender which is designed to maintain the amount of a lender's reserve at 10 percent of its outstanding loan balance, less claims approved for payment. See 24 C.F.R. §§ 201.12 and 201. 675 (1976). We have informally been advised that the total amount of all claims from First Colonial presently pending with HUD may exceed the 10 percent insurance reserve, in which case no additional insurance protection from HUD would be available.

As explained above, our decision of January 23, 1976, was primarily concerned with the issue of whether an insured loan would retain its insured status even if the lending institution did not continue to pay its insurance premiums "in advance" as required by 12 U.S.C. § 1703(f). We held that the purpose of the statutory requirement for advance payment of insurance premiums was to prevent the insured from being protected by insurance for which he has not paid. We therefore concluded that any loans that went into default after the premium delinquency arose were not covered by insurance. HUD does not disagree with this conclusion. Thus, in its letter to us of May 5, 1976, responding to a request for additional clarification of its views in this regard HUD took the following position:

> The Title I Regulations make no provision for voluntary termination of insurance coverage or for a termination charge. In the event of a failure of an insured lender to timely remit insurance charges when due it would, however, be our view that insurance coverage would lapse, and the Secretary would not be obligated to honor a claim where the insurance charge for the loan had not been paid. Under such circumstances, of course, it would be difficult to continue to press the insured lender for payment of the unpaid insurance charges. * * *

However, our January 23 decision also held, at least implicitly, that any lender had the general option of deciding whether or not to continue its insurance coverage and that therefore it would not be proper to set-off past due premiums attributable to loans not yet in default without First Colonial's consent since continued insurance coverage might not be desired. It is this portion of our decision that has been

questioned by HUD. Upon consideration of this specific issue, we agree that insured lending institutions are legally obligated to continue to pay insurance premiums over the full term of insured loans, and cannot unilaterally terminate their insurance coverage simply by failing to remit insurance premiums when due. Accordingly, unpaid insurance premiums can be set off against allowable claims without the consent of the lending institution involved. The basis for our conclusion in this regard is set forth hereafter.

The relevant statutory provision with respect to the payment of insurance premiums for mobile home loan insurance is contained in 12 U.S.C. § 1703(f) as follows:

> The Secretary shall fix a premium charge for the insurance hereafter granted under this section, but in the case of any obligation representing any loan, advance of credit, or purchase, such premium charge shall not exceed an amount equivalent to 1 per centum per annum of the *net proceeds* of such loan, advance, or purchase, *for the term of such obligation*, and such premium charge shall be payable in advance by the financial institution and shall be paid at such time and in such manner as may be prescribed by the Secretary. [Italic supplied.]

HUD believes that this provision requires lending institutions to continue to pay insurance premium charges over the full term of insured obligations, and does not allow lenders to terminate their insurance coverage and their reciprocal obligation to continue to pay such premiums until the obligation has matured, been prepaid, or until a claim thereon has been filed. See 24 C.F.R. § 201.640 (1976), *supra*. The basis for abating premium charges falling due after a loan has been prepaid or a claim has been filed, as explained in HUD's clarifying letter to us of May 5, 1976, is that in both cases the term of the obligation would have ended either because of the prepayment or by reason of the acceleration of the note upon its default. Moreover, HUD's view with respect to the Title I insurance program, as explained in its letter to us of May 5, 1976 "is that the entire insurance premium is due when a loan is accepted for insurance but that the premium may be payable in *installments* commensurate with the terms of the obligation." See 24 C.F.R. § 201.630 (a) and (b) (1976).

Although we believe that, standing alone, 12 U.S.C. § 1703(f) is somewhat ambiguous and is susceptible to other interpretations, we also believe that any doubt as to the intended meaning of this provision is removed upon consideration of another provision of the National Housing Act, 12 U.S.C. § 1715(t) (1970), which provides as follows:

> *Voluntary termination of insurance*
>
> Notwithstanding any other provision of the Act and with respect to any loan or mortgage heretofor or hereafter insured under this Act, *except under Section 1703* of this title, the Secretary is authorized to terminate any insurance contract upon request by the borrower or mortgagor and upon payment of such termination charge as the Secretary determines to be equitable, taking into consideration the necessity of protecting the various insurance funds. [Italic supplied.]

Upon such termination, borrowers and mortgagors and financial institutions and mortgagees shall be entitled to the rights, if any, to which they would be entitled under this Act if the insurance contract were terminated by payment in full of the insured loan or mortgage.

HUD relies quite heavily upon this provision in support of its position that lenders under section 1703 cannot unilaterally terminate their insurance merely by discontinuing premium payments. We agree with HUD's position. The clear implication of this specific provision for termination is that, once a loan is submitted and accepted for insurance under section 1703, neither the Secretary of HUD nor the insured lender can terminate such insurance either unilaterally or by mutual agreement until the term of the obligation has expired. Certainly, it would be anomalous to conclude that this provision only refers to the voluntary, mutually agreed upon termination of insurance, but does not restrict a lender's right to unilaterally terminate its insurance coverage by discontinuing further premium payments as they become due.

Although our review of the legislative history of 12 U.S.C. § 1703 does not reveal any information that would be helpful in resolving the issue under consideration here, our examination of the legislative history of 12 U.S.C. § 1715(t), when it was first enacted as section 612(*l*) of Pub. L. No. 87–70, approved June 30, 1961, definitely supports the view that insurance under section 1703 cannot be terminated prior to the expiration of the term of the obligations involved. The report of the Senate Committee on Banking and Currency on this legislation explains the purpose of this provision as follows:

Voluntary termination of FHA insurance on multifamily housing mortgages and loans

Section 509(k) would permit voluntary termination of FHA insurance of a loan or mortgage covering multifamily housing project. The insurance could be terminated if the borrower and the lender both make the request. The Commissioner has authority to impose termination charges in such cases. The new programs which would be authorized by the bill would be included under the provision. *Under present law FHA has this authority only with respect to one- to four-family home mortgages. FHA insurance cannot now be terminated on a loan covering a multifamily structure unless the mortgage is prepaid.* S. Rep. No. 281, 87th Cong., 1st Sess., 40 (1961). [Italic supplied.]

As this explanation indicates, insurance issued under the National Housing Act, as amended, cannot be voluntarily terminated unless a provision such as that contained in 12 U.S.C. § 1715(t) is applicable thereto. It follows that since this provision expressly provides that it does not apply to insurance issued under 12 U.S.C. § 1703, such insurance cannot be terminated voluntarily or otherwise, for purposes of premium payments, prior to the end of the term of the obligations involved.

Although this result may seem harsh, especially in a situation where the lending institution may be required to continue to pay premiums

even though the 10 percent insurance reserve becomes exhausted and no additional insurance protection will be provided by HUD, we believe that there are additional reasons for reaching this conclusion. For one thing, it appears that the Title I insurance program is self-supporting and that premium income has been sufficient to cover both losses and operating expenses under the program. See S. Rep. No. 281, *supra*, 40. It is reasonable to assume that the self-sufficiency of this program is predicated on the statutory arrangement that lending institutions must pay a premium which is based on all of the loans submitted for insurance, even though the insured can only collect on a maximum of 10 percent of that total. Of course, this statutory arrangement can only be effective if lending institutions are not allowed, once a loan is submitted and accepted for issuance, to terminate the insurance thereon. The statutory arrangement, as well as the program's self-sufficiency, might be defeated if a lending institution was permitted to stop paying premiums after the 10 percent figure is reached and the insurance reserve is exhausted. In this regard we should point out that 12 C.F.R. § 201.640, *supra*, which sets forth the only circumstances in which refunds or abatements of premium charges are permissible does not include unilateral, or, for that matter, the mutual, termination of insurance coverage or the exhaustion of the insurance reserve.

Also, in its letter of May 5, 1976, HUD said the following in this regard:

> * * * the fact that the statutory liability of the Secretary to honor claims may have ended by reason of exhaustion of the insurance reserve would not necessarily dictate that the insured lender's obligation to continue to pay insurance installments has also ended. Instances have arisen involving similiar situations where a bank has been declared insolvent and the insurance reserve exhausted. In such cases the insuring agency (FDIC, FSLIC, etc.) has arranged with the succeeding financial institution to pay the insurance installments to the Secretary on loans previously acknowledged for insurance by the Secretary even though there was no possibility of future claims being honored by the Secretary.

We have found judicial precedent for this position. Section 407(a) of the National Housing Act, 12 U.S.C. § 1730, at one time required any savings and loan association that wished to terminate its deposit insurance with the Federal Savings and Loan Insurance Corporation to continue to pay the premium charges for such insurance "for a period of three years after the date of such termination * * *." Section 407(a) also provided that once an insured institution so terminates its insured status, its accounts were no longer covered by insurance. In the case of *Federal Savings and Loan Insurance Corporation* v. *Edison Savings and Loan Association*, 83 F. Supp. 1007 (S.D.N.Y.) (1949) this provision was attacked on the following grounds:

> * * * the failure to furnish insurance coverage for premiums allegedly due makes the contract void and unenforcible for want of consideration; since the

plaintiff assumes no risk it is not lawfully entitled to premiums; since the plaintiff, after demand, refused to give insurance coverage the defendant is now relieved of any obligation to pay premiums; since the defendant ceased to be an insured institution it ceased to have any insured accounts upon which a premium could be computed under Section 404(a) of the Act, 12 U.S.C.A. § 1727(a); to require defendant to pay premiums without affording it coverage would be to deprive the defendant, its members and shareholders of property without just compensation and without due process in violation of Article V of the Amendments to the Constitution of the United States.

After considering and rejecting each of these arguments in turn, the court concluded that the statutory requirement, however burdensome, was clear and unambiguous and did in fact require the lending institutions to continue to pay the required insurance premiums, although no additional insurance coverage was available. Also, in this regard see *Federal Savings and Loan Insurance Corporation* v. *Grand Forks Building and Loan Association*, 85 F. Supp. 248 (D. N.D. 1949).

We believe that the same principle enunciated in the above-cited case is applicable here. Reading 12 U.S.C. §§ 1703(f) and 1715(t) together, as well as the legislative history of the latter provision, the congressional intent becomes clear that once a loan is accepted for insurance under 12 U.S.C. § 1703, the lender must continue to pay premiums until the term of the loan has ended even if the loan is no longer covered by insurance.

In accordance with the foregoing, and notwithstanding anything to the contrary in our decision of January 23, 1976, we now believe that payment of the insurance premiums on loans insured under 12 U.S.C. § 1703 constitutes a continuing obligation of a participating lending institution that cannot be terminated prior to the end of the term of the underlying loans and must, therefore, be paid by the lender as such premiums become due regardless of possible exhaustion of the insurance reserve. However, we continue to believe for the reasons stated in our decision of January 23, 1976, that payment of such premiums in advance is required in order to maintain active, ongoing insurance coverage. Therefore, claims cannot be honored if the default in the insured loan occurred after the premium delinquency arose.

Having reached this conclusion, we are faced with the question of how best to proceed in the instant case to effect a collection of the unpaid premiums. As stated in 41 Comp. Gen. 178 and 28 *id.* 543, *supra*, it has consistently been held that the Government has the same right of set off as do other creditors. Accordingly, we believe that, HUD has the authority to set off delinquent unpaid insurance premiums constituting an existing debt presently due and payable to the United States by First Colonial against allowed insurance claims payable by HUD to First Colonial. However, this set off would not include amounts attributable to loans which went into default while

premium payments therefor were not current since such loans have ceased to be eligible for insurance. *Cf.* 24 C.F.R. § 201.640(c), *supra.*

As stated above, we do not believe that the fact of First Colonial's involvement in a bankruptcy proceeding significantly affects the Government's right of set-off in this regard, since 11 U.S.C. § 108 specifically provides for the set-off of mutual debts by any creditor in such a situation. Although that section is not self-executing, we believe that prior to paying any claims HUD would be justified in withholding an amount equivalent to the total of all delinquent premiums that are due and owing as of the date the claims are to be paid pending an adjudication by the appropriate court or the trustee in bankruptcy as to the propriety of a final set-off.

The situation with respect to the payment of premiums that will become due in the future is different however. In light of our conclusion that payment of the insurance premium pursuant to 24 C.F.R. § 201.630(b) constitutes a continuing obligation of the lender that cannot be terminated prior to the end of the loan term, we believe that the unpaid insurance premium which will become due in the future can be likened to an unmatured debt which is owing but has not yet become due. The general rule with respect to the set-off of unmatured debts is stated in pertinent part as follows in 20 Am. Jur. 2d, Counterclaims, Recoupment, and Setoff § 57:

> Generally, a claim or demand of a defendant against the plaintiff must be due and owning at the commencement of the action in order to be available as a setoff or counterclaim. The basis of the general rule is the principle that all issues in an action are to be determined as of its date of commencement. To allow a debt not due to be set off against one already due would be to change the contract and advance the time of payment. In other works, the general statutes of setoff and counterclaim apply to mutual debts only and do not comprehend mutual credits. Mutual debts, in the purview of a status of setoff, are not merely those which are owning, but those which are due and payable, on each of which the cause of action has accrued and exists at the same time, while they are mutual credits if either remains to be paid at a future day.

It is generally held that set-off is only appropriate when the debt involved is liquidated and certain in amount. See 20 Am. Jur. 2d, Counterclaims, Recoupment, and Setoff § 61. However, it is possible that some loans may go into default or be paid in full before their term (as fixed in the loan agreement) is ended, thus reducing -under the abatement provisions of 12 C.F.R. § 201.640—the amount of insurance premiums that would become due in the future. Thus there is presently no debt for future premiums which is certain in amount. Accordingly, although it is our view that the lender's obligation to pay insurance premiums is a continuing one, we do not believe that it would be proper for HUD to set-off estimated premiums that might become due in the future against claims by First Colonial that are currently payable.

As stated above, to the extent that anything in our decision of January 23, 1976, is inconsistent with what we have said herein, 55 Comp. Gen. 658 is modified accordingly.

[B-187003]

Contracts—Damages—Unliquidated—Claim Submission to GAO for Approval—Not Required

It is no longer necessary for contracting agencies to submit to General Accounting Office for approval claims for unliquidated damages for breach of contract by Government where contracting agency and contractor mutually agree to settlement, because such settlements are favored by courts and are not viewed as disputes beyond authority of contracting agencies to settle. 47 Comp. Gen. 475 and 44 *id.* 353, modified.

In the matter of August Perez & Associates, Inc., and Curtis and Davis Architects, January 24, 1977:

The General Services Administration (GSA) has requested our Office's authorization to settle a claim by August Perez & Associates, Inc., and Curtis and Davis Architects (a joint venture) (Perez) based on a breach of contract resulting from Government-caused delays in the performance of contract No. GS-00-B-611.

The contract in question was for design services for the Department of Health, Education, and Welfare's Public Health Service Hospital, Carville, Louisiana. The contract was awarded on October 12, 1966; and based on the schedule which resulted from negotiations between the parties, the contract was to be completed by May 9, 1968. During the course of the contract, Perez was to submit various types of drawings at predetermined intervals, and the Government was given 3 weeks to approve the drawings so that Perez could proceed to the next phase of performance. However, because of Government delays in approving the drawings, failing to furnish information to the architect such as equipment layouts and to select between alternatives presented by the architects in a timely manner, the contract was not completed until May 16, 1972. Accordingly, a contract which was to have been performed in approximately 1½ years took 5½ years to complete.

GSA states that except for a 7-week delay not caused by the Government, the remainder of the 4-year delay is directly attributable to the Government.

GSA and Perez have agreed to settle the claim for damages resulting from the above-mentioned delays for $58,000, and GSA requests our concurrence in this action.

It must be noted at the outset that the contract did not contain a "Suspension of Work" clause and, therefore, as GSA could not admin-

istratively pay the above amount under the terms of the contract, the claim was forwarded to our Office on the basis that it was a claim for damages arising from Government-caused delays which appeared to constitute a breach of the contract.

It has been the position of our Office that where a contract does not contain a "Suspension of Work" clause or other provision expressly granting the contractor a right to compensation for delay, a claim by the contractor for costs incurred through Government-caused delays is essentially a claim for breach of contract damages which the contracting officer has no authority to pay. 44 Comp. Gen. 353 (1964) and 47 Comp. Gen. 475 (1968). While this Office has jurisdiction to settle a claim based on a breach by the Government, it will only settle claims where there is no doubt as to the liability of the Government and the amount of damages can be determined with reasonable certainty.

As noted above, the Government and the contractor have agreed to a settlement of $58,000; and for the reasons stated *infra*, we do not find it necessary for our Office to administratively approve the settlement, notwithstanding the holdings in the above-cited cases.

The basis for our prior holdings that breach of contract claims were outside the authority of the contracting agency to decide and settle was a series of decisions and opinions by the United States Supreme Court, the Court of Claims and the Attorney General to that effect. See *McKee* v. *United States*, 12 Ct. Cl. 504, 555–558 (1876); *Cromp* v. *United States*, 216 U.S. 494 (1910); Ops. Atty. Gen. 881 (1841).

Our Office has carefully reviewed the precedents in this area, both from our Office and the courts, and believes the submission of claims for unliquidated damages for breach of contract by the Government in the future to be unnecessary where the contracting agency and the contractor mutually agree to a settlement. We find this action to be supported by the U.S. Court of Claims in *Cannon Construction Company* v. *United States*, 162 Ct. Cl. 94 (1963), in which it was stated:

> Significantly, plaintiffs have cited us no authority where this court has invalidated, on the ground of lack of authority, any agreement made by the contracting officer in the settlement of a claim for damages for breach of contract. On the contrary, we have held on numerous occasions that compromise settlements were valid and binding on both parties.

The above language was quoted with approval by the Court of Claims in *Brock & Blevins Company, Inc.* v. *United States*, 170 Ct. Cl. 52, 59. (1965).

In 44 Comp. Gen. *supra*, we invited attention to the following quote from *Utah Construction and Mining Company* v. *United States*, 168 Ct. Cl. 522 (1964):

> Where the dispute "arises under the contract" the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive: but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated

damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc.* v. *United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin* v. *United States*, 100 Ct. Cl. 15 (1943); *B–W Construction Co.* v. *United States*, 101 Ct. Cl. 748 (1944); reversed in part on other grounds, *United States* v. *Beuttas, et al.*, 324 U.S. 768 (1944). *If they undertake to do so—which they rarely do—neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever, Steamship Co.* v. *Tugman*, 106 U.S. 118, 122 (1882); *Coyle* v. *Skirvin*, 124 F. 2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel*, 49 F. Supp. 109, 111 (S.D.N.Y. 1941) [Italic supplied.]

We do not believe situations such as the one currently before our Office constitute a "dispute" as that term is employed in the above quote. Where both parties agree as to the liability of the Government for the breach and agree to a settlement figure, there is no "dispute." Therefore, whether the settlement has a binding effect is irrelevant because both parties have agreed to the terms and even if the contractor later attempted to litigate the issue, the courts treat such an agreement as a binding accord and satisfaction. See *Seeds & Durham* v. *United States*, 92 Ct. Cl. 97 (1940), and *Brock & Blevins*, *supra*.

Accordingly, based on the above, it is unnecessary for our Office to administratively approve the instant settlement and GSA may effectuate the settlement as agreed.

[B–187547]

Contracts—Negotiation—Offers or Proposals—Evaluation—Allegation of Bias Not Sustained

Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Proposals Not Within Competitive Range

Where proposal is determined not to be in competitive range, contracting officer is not required to conduct meeting with offeror prior to award to permit clarification of proposal; offeror is entitled only to post-award debriefing.

In the matter of Joanell Laboratories, Inc., January 25, 1977:

The subject protest has been filed by counsel for Joanell Laboratories, Incorporated, against the exclusion of that firm's proposal from the competitive range established under request for proposals (RFP) No. N61339–76–R–0066, issued by the Naval Training Equipment Center (NTEC), Orlando, Florida. The RFP was for development of a permanently installed Defense Test Range, Device A3F78, and two Portable Combat Ranges, Device A3F80, to meet the requirements

for Infantry Remote Target Systems (IRETS). Joanell's proposal was regarded as technically unacceptable.

The protester's essential allegation is that the procurement is being conducted "in an unreasonable and prejudicial manner" as a result of Navy bias against it. As evidence of such bias Joanell states that (1) the evaluation of its proposal was unduly cursory or arbitrary because the purported proposal deficiencies do not exist in fact; and (2) the contracting officer acted improperly in refusing an appointment with either Joanell or its counsel so that Joanell could persuade the contracting officer that discussions should be conducted to "clarify" the meaning of Joanell's proposal, presumably so that Joanell could correct serious technical misunderstandings by agency officials with the anticipated result that the Joanell proposal would be found eligible for inclusion in the competitive range for the purpose of subsequent formal negotiations. In this connection, the protester refers to *RAI Research Corporation*, B-184315, February 13, 1976, 76-1 CPD 99, as a case where such a technical clarification conference was permitted, notwithstanding a finding that the firm's proposal was unacceptable, and questions why the conference was granted to a Joanell competitor in that case but refused Joanell here.

In support of its assertion of bias, the protester, referring to litigation currently pending in the Court of Claims and to a protest it filed in this Office, suggests that the Navy's bias against Joanell stems from the firm's resort to either judicial fora or this Office to protect its rights to proprietary data under prior contracts and its right to compete in NTEC procurements.

The RFP required the submission of technical proposals in two parts, addressed to "technical approach" and "integrated logistic support (ILS) plan," weighted in that order of relative importance. Proposals were received from four firms, and upon evaluation, three were considered to be within a competitive range. Out of a possible 100 points, the highest ranked offeror received 82.4 and 81 points for technical approach and logistic support, respectively; the second ranked offeror scored 82.3 and 80; the third 75.1 and 84. Joanell was scored 54.5 and 49, with a notation of unacceptability under each criterion.

The unacceptability of Joanell's technical approach was based on the perceived necessity for a complete redesign of five of nine major assemblies and significant redesign of two other assemblies. In addition, all other areas of the proposal were considered to require in-depth clarification to completely describe the operation and design of all equipment and to describe how the design (including environmental, mechanical, electrical, reliability, safety, maintainability, EMI suppression, and human engineering) would meet specification require-

ments. Joanell's ILS plan was also unacceptable in three of five areas, and marginal in two others.

Subsequent to this evaluation, Joanell was advised that its offer was determined to be outside the competitive range because of deficiencies in many areas; five representative deficiencies were listed. Joanell was further advised that negotiations with it were not contemplated and that a revision of its technical proposal would not be considered. However, Joanell was offered a post-award debriefing pursuant to ASPR § 3-508.4 (1975 ed.).

Joanell responded to the specific deficiencies referenced with a telegram in which it pointed out why it felt its proposal was not deficient in those areas. In turn, NTEC prepared a memorandum setting forth its technical conclusions as to why it still considered Joanell unacceptable in the areas discussed.

NTEC's Preliminary Proposal Evaluation Report sets forth in considerable detail the deficiencies perceived in Joanell's proposal. These deficiencies, which number more than 70, appear to fall generally into such categories as (a) inconsistency with specifications, (b) incomplete information, (c) no information, and (d) technically undesirable or not feasible. In response, Joanell has furnished a point-by-point rebuttal of 32 pages in length, addressing most of the stated deficiencies. For many deficiencies, Joanell points to specific sections of its proposal where it claims to have provided either the supposedly missing or incomplete information or an indication that the specifications would be met rather than ignored. For other deficiencies it explains the reasons for its particular approach. In some instances it refers to typographical errors.

As Joanell recognizes, it is not our function to evaluate proposals to determine their eligibility for ultimate award. *TGI Construction Company, et al.*, 54 Comp. Gen. 775 (1975), 75-1 CPD 167; *Techplan Corporation*, B-180795, September 16, 1974, 74-2 CPD 169; *Decision Sciences Corporation*, B-182558, March 24, 1975, 75-1 CPD 175. Rather, since determinations as to the needs of the Government are the responsibility of the procuring activity concerned, the judgment of the activity's technicians and specialists as to the technical adequacy of proposals submitted in response to the agency's statement of its needs will ordinarily be accepted by this Office, absent a clear showing of unreasonableness. This is particularly the case where, as here, the procurement involves equipment of a highly technical or scientific nature and the determination must be based on expert technical opinion. *See RAI Research Corporation, supra*, and citations therein.

Furthermore, we will not regard a technical evaluation as unreasonable merely because there is substantial disagreement between the contracting agency and the offeror, *see Decision Sciences Corporation*,

B-183773, September 21, 1976, 76-2 CPD 260; *UCE, Incorporated*, B-186668, September 16, 1976, 76-2 CPD 249; *Honeywell, Inc.*, B-181170, August 8, 1974, 74-2 CPD 87, or because bias on the part of the agency has been alleged. *See Decision Sciencies Corporation*, B-183773, *supra; Plessey Environmental Systems*, B-186787, December 27, 1976, 76-2 CPD 533; *Houston Films, Inc.*, B-184402, December 22, 1975, 75-2 CPD 404. For a technical evaluation to be deemed unreasonable, it must clearly appear from the record that there is no rational basis for the evaluation. *See*, e.g., *Tracor Jitco, Inc.*, 55 Comp. Gen. 499 (1975), 75-2 CPD 344, and 54 Comp. Gen. 896 (1975), 75-1 CPD 253; *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74-2 CPD 137.

With the above principles in mind, we have carefully reviewed the record in this case, including the detailed technical submissions. We find that the record establishes fundamental disagreement between Joanell and the Navy as to the adequacy of the Joanell proposal, but does not permit the conclusion that the Navy's evaluation was unreasonable. Although we are not in a position to resolve the disagreement with respect to each stated deficiency, it does appear to us that many of the disputed points are of such a nature that the proposal could reasonably be evaluated as it was.

For example, many areas of disagreement appear to involve only the exercise of reasoned technical judgment with respect to either the desirability or efficiency of a particular approach or the extent to which some feature of the proposed system is adequately addressed in the proposal. As one example, in response to NTEC's observation that Joanell's system, in response to a requirement for simulated nighttime rifle fire, would illuminate the entire target, Joanell responds that it proposed "low level illumination of the target which can be spot intensified with a small strip of reflective tape to simulate rifle fire." In our opinion, this response does not establish that the perceived deficiency does not exist, but only that Joanell regards its approach for simulated rifle fire as an acceptable one while NTEC does not so view it. While we do not mean to suggest that this type of deficiency alone should necessarily warrant rejection of a proposal, we do think it typifies many of the areas of disagreement in this case.

In other areas, Joanell indicates that (1) it may have caused confusion with regard to one aspect of its system because it defines a requirement differently than do the specifications, and (2) it did not adhere to specified requirements because its approach would be more advantageous. However, it is not clear that Joanell's proposal adequately explained either of these approaches, and we point out that even if the proposal did so, the desirability of a nonconforming approach would be entirely up to the evaluator's judgment.

In still other areas, although Joanell states that deviations in its proposal with respect to voltage and dimensions were merely typographical errors, it is not clear to us why the evaluators should have been aware of that fact. Moreover, we do not agree with Joanell that a perceived proposal deficiency does not exist because "[b]y extrapolation" from data referenced in the proposal the evaluators could have determined the acceptability of another aspect of Joanell's system, since it is the responsibility of offerors to submit clear and complete proposals. *See* e.g., *Servrite International, Ltd.*, B–187197, October 8, 1976, 76–2 CPD 325.

Finally, we note that Joanell, while attempting to rebut or explain each of the deficiences noted with respect to its technical approach, has not responded to any of the deficiences noted with regard to the ILS portion of its proposal.

Thus, on this record, we cannot conclude that the technical evaluators acted arbitrarily or unreasonably in rating Joanell's proposal as they did. It appears that the evaluation was consistent with the specifications and evaluation criteria, that all proposals were subject to the same detailed technical examination, and that NTEC's evaluation reflected only the reasoned judgment of the evaluators. *See METIS Corporation*, 54 Comp. Gen. 612 (1975), 75–1 CPD 44.

In view of this evaluation and the resulting disparity between Joanell's scores and the scores achieved by the other three proposals, we see no basis for objecting to the exclusion of Joanell from the competitive range. *See* 52 Comp. Gen. 718 (1973); *id.* 382 (1972). Neither can we say that NTEC acted improperly by refusing to meet with Joanell after Joanell's proposal had been rejected. Discussions need be held only with those offerors who are in the competitive range. ASPR § 3–805.1. Although Joanell states it wanted only to "clarify" its proposal, it was the judgment of NTEC that Joanell's proposal required major revision and could not be made acceptable by clarification. That judgment is not subject to question unless "there is evidence of fraud, prejudice, abuse of authority, arbitrariness, or capricious action." B–165457, March 18, 1969, quoted in *METIS Corporation*, *supra*, at 616. There is no such evidence in this case.

We recognize that denying any offeror whose proposal is not included in the competitive range an opportunity to discuss the proposal until a post-award debriefing "may make it extremely difficult" for the offeror to prove that rejection of its proposal was incorrect. *Daconics*, B–182309, May 19, 1975, 75–1 CPD 300. However, we also recognize that "once a proposal has been determined to be unacceptable * * * it would be illogical to discuss this conclusion with the offeror thereby placing him in the position to clarify or enlarge upon the proposal

and possibly to allege that once this has been done the proposal should be reconsidered," and that in any event that applicable regulations (here, ASPR § 3-508.4) provide only for a debriefing after a contract has been awarded. *Daconics*, *supra*. Accordingly, we held in *Daconics* that an agency properly declined to discuss an unacceptable proposal with an offeror prior to award selection, notwithstanding the offeror's request that it be allowed to do so. The same conclusion is warranted here.

The case of *RAI Research Corporation*, *supra*, is not inconsistent with this view. Joanell is incorrect in stating that its competitor was permitted to clarify its proposal so that it was ultimately found acceptable, notwithstanding an initial finding of unacceptability. In that case, there were two proposal evaluation reports from agency technical personnel, one finding the proposal to be unacceptable but the other finding the proposal acceptable. Under such circumstances, the contracting officer felt he had a duty under ASPR § 3-805.2, which provides for including doubtful proposals in the competitive range, to include the proposal in the competitive range and to hold discussions with the offeror. There was, of course, no such doubt concerning Joanell's proposal in this case.

In summary, we find that there is no evidence of bias on the part of NTEC against Joanell. The evaluation of Joanell's proposal appears to have a reasonable basis, and the refusal of the contracting officer to meet with Joanell to discuss its proposal was consistent with both applicable regulations and a prior decision of this Office. "Where, as here, the record reasonably supports the agency's * * * [actions], mere allegations of biased evaluation provide no basis for our Office to interfere with the agency's determination" that a proposal was unacceptable and outside the competitive range. *Servrite International, Ltd.*, *supra*.

The protest is denied.

[B-185302]

Contracts—Termination—Convenience of Government—Not Recommended—Urgency Procurement

Where General Accounting Office (GAO) recommended that agency examine feasibility of terminating improperly awarded contract for convenience of Government, agency's response establishes grounds for position that award should not be disturbed due to urgency of supply situation. Therefore, notwithstanding doubts concerning methodology used by contracting officer in arriving at termination for convenience cost estimate, considering all circumstances of case GAO cannot conclude that recommending termination for convenience would be in best interests of Government. 55 Comp. Gen. 1412, modified.

In the matter of a recommendation concerning Defense Supply Agency Contract No. DSA100–76–C–1280, January 26, 1977:

In *Society Brand, Inc.—request for reconsideration*, 55 Comp. Gen. 1412 (1976), 76-2 CPD 202, our Office recommended that the Defense Supply Agency (DSA) examine the current feasibility of terminating for the convenience of the Government contract No. DSA100–76–C–1280, which was awarded to Propper International, Inc. (Propper), under invitation for bids (IFB) No. DSA100–76–B–0033. In an earlier decision we had concluded that Propper was not eligible for an award under the IFB (*Propper International, Inc., et al.*, 55 Comp. Gen. 1188 (1976), 76–1 CPD 400).

DSA responded to our recommendation by letter to our Office dated September 28, 1976. DSA maintained that it would not be in the best interests of the Government to terminate Propper's contract in light of (1) the costs which would be involved (an estimated $588,782 in relation to a total contract price of $1,317,840), and (2) the continuing urgency of the supply situation in regard to the service caps being furnished under the contract (which would be exacerbated by the delays attendant to making award to a new contractor).

The interested parties were provided with an opportunity to comment on DSA's position. The bidder which apparently would be in line for an award after a termination, Society Brand, Inc., did not comment. The bidder next in line, Bancroft Cap Company, Inc. (Bancroft), contests DSA's views.

Bancroft points out that a new solicitation was recently issued for the same type of item. However, DSA responds that the quantitites called for in the new procurement are in addition to quantities being obtained under the subject contract. Bancroft further contests DSA's view that termination and reaward would result in production delays. DSA stands by its position that transfer of cut Government-furnished cloth to a new contractor is not considered feasible based upon past experience in similar situations, and that production delays could be expected to result. DSA also points out that even without any further delays, the supply urgency for the service caps will exist until at least February 1977.

Bancroft also suggests our Office should recommend that Propper's contract be terminated for default because of alleged delivery delays. DSA responds that the contracting officer is not disposed to take such action. In this regard, our Office has indicated that we will not become involved in considering whether to recommend a termination for default in situations of this kind. See *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 972 (1976), 76–1 CPD 240.

Finally, Bancroft contends that DSA's termination cost estimate is primitive, since it is based merely on the application of a percentage factor to the contract price of the undelivered quantities. In this regard, DSA concedes that the submission and analysis of cost data would produce a more precise estimate. However, DSA suggests that, for the purposes involved here, the judgment of an experienced contracting officer in making the estimate should be given weight by our Office in reaching a decision whether to recommend a termination for convenience. While we agree that the judgment of an experienced contracting officer should be accorded weight, we share Bancroft's doubts concerning the methodology employed in arriving at the termination estimate in this case. We believe that the record in a case of this kind should contain more substantiation of the factual grounds upon which the contracting officer's judgment is based than is present in the record before us.

However, notwithstanding our doubts concerning the termination cost estimate, we believe that DSA has established grounds for not disturbing the award due to the urgency of the supply situation. Considering all the circumstances, we cannot conclude that recommending termination for convenience of Propper's contract would be in the best interests of the Government. Accordingly, our Office is closing its file in this matter without further action.

[B-186990]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Closing Charges—Documentation Required for Reimbursement

Employee who purchased residence incident to transfer of duty station claims closing costs paid by seller but included in purchase price. Since closing costs are clearly discernible and separable from price allocable to realty and both buyer and seller regarded costs as having been paid by buyer, claim may be paid for full amount of closing costs upon proper documentation itemizing the costs, the amount of each item claimed, and claimant's liability therefor. 52 Comp. Gen. 11, modified.

In the matter of Henry F. Holley—relocation expenses—closing costs, January 26, 1977:

This action is in response to a letter dated August 31, 1976, from Mr. Thomas G. Gall, an Authorized Certifying Officer of the National Park Service, Department of the Interior, requesting an advance decision as to the entitlement of Mr. Henry F. Holley, an employee of the National Park Service, to reimbursement of real estate expenses in the amount of $779.90 incurred in connection with his purchase of a new home incident to the transfer of his official duty station from Brooklyn, New York, to Washington, D.C.

The costs in question are closing costs on the residence purchased by Mr. Holley in the vicinity of his new official station, which would clearly be allowable under 5 U.S.C. § 5724a(a)(4) (1970) and chapter 2, part 6, of the Federal Travel Regulations (FPMR 101–7, May 1973) but for the fact that they were included in the purchase price of the residence.

It appears that this form of financing was agreed upon between Mr. Holley and the vendor of the home in an effort to expedite closing since Mr. Holley did not have adequate funds to cover the required closing costs at the time of settlement. This arrangement would allow Mr. Holley to pay for the closing costs over the life of the mortgage. In support of his claim, Mr. Holley has submitted a letter from the manager and a sales agent of Aquia Realty (the real estate firm which handled the sale of the residence for the vendor), indicating that the final sales price of $43,000 included an additional $1,000 above the basic sales price to cover the costs of closing less prepaid items. Mr. Holley has also included, in addition to the actual settlement statement used at the closing, a settlement statement listing the closing costs that, according to Mr. Holley, would have been charged to him had they not been included in the sales price of the home.

In our decision in 52 Comp. Gen. 11 (1972), reimbursement of closing costs had originally been denied because closing costs were included in the purchase price of the real estate and hence were not regarded as having been paid by the purchaser. Upon reconsideration, we held that claims for reimbursement of closing costs in that case and in all future analogous cases would be allowed. See B–174527, August 23, 1974, and B–176459, August 17, 1972. In 52 Comp. Gen. 11 it was stated, at page 13, that:

> The closing costs which were added to the purchase price are clearly discernible and separable from the price allocable to the realty. Although the seller may have actually performed the act of initially paying the costs, the down payment and the amount paid at closing by the purchaser from his own funds exceeded the amount of those costs and the seller regards them as having been, in effect, paid by the purchaser. Also, the purchaser has supplied documentation of the amount of the costs and of his liability for them.

Paragraph 2–6.1 of the Federal Travel Regulations (FPMR 101–7, May 1973) states the general conditions and requirements under which reimbursement of expenses incurred in connection with residence transactions may be made. Paragraph 2–6.1 states, in pertinent part, that:

> * * * To the extent allowable under this provision, the Government shall reimburse an employee for expenses required to be paid by him in connection with the sale of a residence at his old official station, for purchase (including construction) of one dwelling at his new official station * * *.

The rule to be derived from our decision in 52 Comp. Gen. 11 (1972), and paragraph 2–6.1 of the Federal Travel Regulations, in claims in

which closing costs have been included in the purchase price of a home and have been paid by the seller, is that the buyer may be reimbursed for such costs, if the costs are otherwise allowable under applicable law and regulations, where:

(1) the closing costs are clearly discernible and separable from the price allocable to the realty;

(2) both the seller and the buyer regard the costs as having been paid by the buyer; and

(3) the buyer supplies documentation showing the amount of the closing costs and his liability for them.

The letter from Aquia Realty and informal discussions with the sales agent of that firm who handled the sale to Mr. Holley clearly indicate that it was understood by all parties concerned that Mr. Holley was actually paying closing costs as part of the purchase price. Since paragraph 2-6.1 of the Federal Travel Regulations indicates that expenses may be reimbursed so long as they are "required to be paid" by the employee and because Mr. Holley did incur a liability in the form of a mortgage which included the amount of the closing costs, our Office regards the closing costs as having been paid by Mr. Holley at closing and, therefore, reimbursable.

The sales agent representing Aquia Realty also informed us that the closing costs for which Mr. Holley was liable could be itemized by the realty firm and the amount of each computed. We note, however, that as of now the required documentation has not been supplied and the closing costs are not, therefore, "clearly discernible and separable."

Accordingly, the claim submitted by Mr. Holley for closing costs in the amount of $779.90 may be paid in full if otherwise proper. However, proper documentation itemizing the closing costs, the amount of each item claimed, and Mr. Holley's liability must be submitted to the Authorized Certifying Officer before payment may be made.

[B-187367]

Contracts—Negotiation—Requests for Proposals—Protests Under—Wording

Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to specifically request ruling by Comptroller General as required by section 20.1(c)(4) of General Accounting Office's Bid Protest Procedures.

Contracts—Negotiation—Requests for Proposals—Amendment—Protest

Sole-source procurement was changed to competitive procurement by amendment to request for proposals (RFP) which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to

proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendement.

Contracts—Negotiation—Late Proposals and Quotations—Sole-Source Solicitation—Amend or Cancel RFP

Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition.

Contracts—Negotiation—Responsiveness—Concept Not Applicable to Negotiated Procurements

"Responsiveness" is not concept applicable to negotiated procurements. Therefore, fact that initial proposal is not fully in accord with RFP requirements is not reason to reject proposal if deficiencies are subject to being made acceptable through negotiations.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Ability to Meet Requirements

Contracting agency's technical evaluation that proposal for amplifiers can meet RFP requirement for interchangeability with corresponding Government equipment will not be disturbed, since it has not been shown to be arbitrary or contrary to statute or regulations.

In the matter of TM Systems, Inc., January 26, 1977:

Request for proposals (RFP) No. N00039-76-R-0288(S) was issued on April 27, 1976, by the Naval Electronic Systems Command (NAVELEX) to TM Systems, Inc. (TM), on a sole-source basis to procure 18 amplifiers, associated repair parts, and options for additional repair parts. The solicitation required the amplifiers to be manufactured so that they would be interchangeable with similar equipment being used by the Navy.

The justifications for procuring the items on a noncompetitive basis were that (1) TM was the only firm that had previously manufactured the equipment and, at the time of issuance of the RFP, the Navy did not have data available which was believed to be adequate for competition; and (2) an urgent requirement existed for the equipment. In regard to the lack of data, in two separate procurements since 1968, NAVELEX has purchased the same amplifiers as those being procured under the present RFP. The first contract was awarded to TM in 1968 after a two-step formally advertised procurement. In 1973 the Navy procured a quantity of the amplifiers from TM in a noncompetitive procurement. The terms of the 1968 contract required the contractor to deliver "Category F" engineering drawings within 60 days after approval and/or delivery of the first production article. NAVELEX states that "Category F" drawings were considered sufficient to have permitted future procurements of the amplifiers on a competitive

basis. However, although delivery and approval of the first production article under the 1968 contract were accomplished in August of 1970, the Navy has not yet received the "Category F" drawings. In August of 1976 an unofficial microfilm copy of the drawings was submitted by TM for informational purposes, but it has not yet been verified for accuracy by the Navy.

Subsequent to issuance of the present solicitation, West Electronics, Inc. (West) expressed to the contracting officer an interest in the procurement and obtained a copy of the solicitation. On June 23, the contracting officer received a proposal from West for the equipment and options solicited in the RFP that was issued to TM. West's offer was conditioned, however, upon the availability as Government-furnished equipment of amplifiers that had previously been produced for the Navy by TM.

Notwithstanding that an urgent requirement existed for the equipment, the contracting officer determined that it would be in the best interest of the Government to obtain competition for the items between the two companies. Accordingly, on August 10 the contracting officer issued to both companies Amendment 0001 to the solicitation, which increased the number of amplifiers to be procured, provided as Government-furnished equipment amplifiers already in use, and established evaluation criteria for award as follows:

> The criteria to be used in evaluation of the contractor's proposal are set forth below in descending order of relative importance, with the most important factor listed first. It is of prime importance that the offeror address each criteria regardless of its relative ranking.
> 1. How the offeror proposes to insure interchangeability.
> 2. How the offeror proposes to meet the delivery schedule.
> 3. In house procedures to be used to assure the quality and reliability of both company fabricated, and vendor purchased components.
> 4. Price (if the offeror is going to use GFP, the evaluation factor, per month of use, shall be 1% of the purchased cost of the property).
>
> Offers shall be reviewed to determine technical acceptability and compliance with technical requirements, and award shall be made to that acceptable offeror, offering the most advantageous proposal to the Government, price and other factors considered.

The amendment also provided in section F:

> The components and parts of the equipment shall be physically, mechanically and electrically interchangeable with the corresponding components and parts of the Government furnished property.

Finally, the amendment established a closing date for receipt of proposals of August 25.

TM states that upon issuance of the amendment it "suspected that perhaps the Navy now was seeking another source." TM states that its "suspicion" was the reason that in its August 20 response to Amendment 0001, it indicated its belief that TM was the only firm that could meet all the evaluation criteria set forth in the amendment, and that any other offeror would have to comply with the Preproduction Test

and other requirements which, because of TM's experience on similar Navy contracts, had been deleted from the RFP issued to TM. TM alleged that compliance with those test requirements would delay delivery, required in 6 months, by at least 9 months.

West responded to Amendment 0001 by August 25. TM states that on or about August 30, it learned that the Navy had received an unsolicited proposal, and that the procurement was no longer being conducted on a noncompetitive basis. That information was verified on September 2 in a telephone conversation with the NAVELEX Executive Director of the Contracts Directorate. TM thereupon filed a protest with our Office, which we received on September 8.

TM presents a number of bases for its protest. First, TM protests the Navy's decision to conduct a competitive procurement rather than proceed on a sole-source basis with TM. TM contends that it is the only firm that can meet the requirements of the first evaluation factor set out in Amendment 0001 and of Section F of the amendment. TM states:

> * * * TM is the designer and sole manufacturer, and, is in sole possession of the drawings, in-house procedures and manufacturing techniques absolutely required to duplicate all the components and parts so as to make the contract end item interchangeable with the Government property.
>
> * * * * * * *
>
> Thus, any firm other than TM that contends it can meet this most important criteria for award, must produce TM drawings, procedures, and manufacturing techniques in order to prove that its equipments will be interchangeable with the components and parts of the government property—which property is previously delivered equipments supplied by TM. Nor, could such a firm employ reverse engineering even if a government furnished end item were made available for such use to meet the criteria of interchangeability since there would be no way it could control plus or minus tolerances of components and parts.

TM's remaining arguments concern the acceptability of West's proposal. TM contends that, since the RFP issued to TM on April 27 required TM's proposal to be submitted by May 14, West's unsolicited proposal, received by the contracting officer on June 23, was a late offer that should not have been considered, and West should not, therefore, have even been provided Amendment 0001. TM also contends that even if West's offer was timely received, it was not responsive to the solicitation and should be rejected. TM alleges the following as bases for that contention:

(1) West failed to complete the clean air and water certification of paragraph 16 of the solicitation;
(2) West did not submit with its offer information concerning material it proposed to purchase, as required in paragraph 19 of the RFP;
(3) West failed to comply with the data requirements of item 0012;
(4) West's response to Amendment 0001 "failed to accept all terms, conditions, and provisions" of the RFP issued to TM on April 27;

(5) "West failed to state how it will meet and insure the interchangeability requirements listed in Amendment 0001";

(6) "West's response to the requirement [in evaluation factor number 2] * * * 'How the offeror proposes to meet the delivery schedule' is nonresponsive since it fails to commit itself to a firm delivery requirement of six months or any period of time."

The Navy, in addition to responding to the merits of the protest, contends that TM's protest to our Office is "inappropriate for consideration" since it does not conform to section 20.1(c)(4) of our Bid Protest Procedures (Procedures), 4 C.F.R. part 20 (1976), which requires that bid protests "specifically request a ruling by the Comptroller General." The Navy also contends that, even if otherwise proper, the protest was not filed within the time required by section 20.2(b)(1) of our Procedures, at least to the extent that the protest involves the Navy's decision to convert a sole-source procurement into a competitive one. In this connection, section 20.2(b)(1) provides in pertinent part:

> * * * In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation.

The Navy argues:

> * * * The basis of TM Systems' allegation involves the amendment to the solicitation that provided for competition into a previously sole source request for proposals. The alleged impropriety did not exist in the initial solicitation but was subsequently incorporated therein; and, therefore, pursuant to 4 C.F.R. § 20.2(b)(1), the protest is untimely unless submitted prior to the next closing date for receipt of proposals following the incorporation. The amended closing date for receipt of proposals was August 25, 1976. TM Systems' letter of protest is dated September 2, 1976 and apparently was not received by your office until September 8, 1976. * * *

The Navy further argues that TM's admission as noted above that upon issuance of Amendment 0001 it "suspected" that another proposal was being considered is evidence that such "alleged impropriety" became apparent to TM prior to August 25.

In response to this last point, TM argues that "The Navy overreaches when it says that because TM said it became 'suspicious' of the Navy when Amendment 0001 was issued on August 10, 1976, it [the alleged impropriety] became 'apparent to them on August 10, 1976.'" TM contends that it did not in fact know of the Navy's actions until approximately August 30, and that its protest, having been filed in our Office within 10 working days thereafter, is timely under section 20.2(b)(2) of our Procedures, which provides that "bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier."

Concerning TM's failure to comply with section 20.1(c)(4) of our

Procedures, a request by a bidder or interested party for review of procurement procedures need not contain exact words of protest to be characterized as a formal bid protest, although the request should reasonably be understood as the lodging of specific exceptions to the questioned procedures. *Johnson Associates, Inc.*, 53 Comp. Gen. 518 (1974), 74–1 CPD 43; *Eocom, Inc.*, B–185345, March 25, 1976, 76–1 CPD 196. TM's letter of September 2 to our Office clearly indicated that it concerned a "Protest Before Award to Anyone Other than TM Systems, Inc. (TM)"; set forth the "basis for the protest to * * * [our] Office"; and stated that TM was "protesting both to the Navy and to [the General Accounting] Office." In view thereof, we consider TM's September 2 letter a "protest," and "appropriate" for our consideration, notwithstanding TM's failure to "specifically request a ruling by the Comptroller General."

Regarding the timeliness of TM's protest, although Amendment 0001 did not specifically state that the procurement was being conducted on a competitive basis, it did modify the original RFP in a manner clearly inconsistent with a sole-source procurement involving TM. Examples of such modification include the interchangeability requirement and the availability, as Government-furnished property, amplifiers previously supplied by TM, as well as the listing of factors for consideration in the evaluation of the relative merits of proposals. Moreover, we agree with the Navy's contention concerning the effect on this issue of TM's admitted "suspicion" after issuance of the amendment. Thus, we believe that in its August 20 response to Amendment 0001, TM in effect elected not to protest but rather to merely state that no other firm could meet the amendment's evaluation criteria. Accordingly, to the extent that the protest involves the Navy's decision to consider an offer other than TM's, the protest, filed in our Office on September 8, is untimely.

Proceeding to the merits of the timely issues presented by TM, and regarding the time of receipt of West's offer, although the offer was submitted after May 14, the closing date for receipt of TM's proposal under the sole-source solicitation, upon evaluation it was determined, as indicated below, that West's proposal offered and could be shown to meet the Government's requirements within the time constraints of the procurement. In such circumstances, an agency would be justified in either canceling the sole-source solicitation and procuring the requirement on a competitive basis, or amending the sole-source RFP to provide for competition. In this connection, *Delta Scientific Corporation*, B–184401, August 3, 1976, 76–2 CPD 113, should be construed to the same effect. Thus, the Navy's consideration of West's proposal, and the resultant issuance of Amendment 0001, were proper.

Concerning the first three alleged deficiencies in West's offer that

TM argues render the offer nonresponsive, the concept of "responsiveness" is not applicable in negotiated procurements, B–174125, March 28, 1972. The fact that an initial proposal may not be fully in accord with specifications or other RFP requirements is not reason to reject the proposal if the deficiences are reasonably subject to being made acceptable through negotiations. In fact, we have stated that the basic purpose of the negotiated procurement is to determine whether deficient proposals are reasonably subject to being made acceptable through discussions. B–176089, September 26, 1972. Accordingly, West's failure to complete the clean air and water certification, and to submit the documentation at issue properly, have not been considered by the Navy as reasons for rejection of West's proposal. In so stating, we have been advised that the Navy intends to request best and final offers pursuant to Armed Services Procurement Regulation (ASPR) § 3–805.3(d) (1976 ed.), at which time the subject requirements may be complied with.

In regard to TM's fourth argument, concerning West's failure in its response to Amendment 0001 to accept the terms, conditions and provisions of the RFP initially issued to TM, since West's offer of June 23 based on that RFP could properly be considered by the contracting officer, the only response necessary upon receipt of Amendment 0001 was submission of revised proposal by August 25 in accordance with the terms of the amendment.

TM's final two arguments concerning West's "responsiveness" in effect deal not with "responsiveness" as it applies to formally advertised procurements, but with the Navy's evaluation of West's responses to the first two evaluation factors set forth in Amendment 0001, and with West's technical ability to insure interchangeability and to meet the delivery schedule. In this connection, since award has not yet been made, we must consider TM's protest on these issues as being against the Navy's decision to even negotiate with West on the basis of West's initial and revised proposals.

ASPR § 3.805–1(a) (1976 ed.) requires that after the receipt of initial proposals, discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and "other factors" considered. The term "other factors" includes the technical acceptability of proposals. See *Economic Development Corporation*, B–184017, September 16, 1975, 75–2 CPD 152. The determination, made on the basis of a solicitation's established evaluation criteria, of whether a proposal is technically and otherwise acceptable and therefore within the competitive range is a matter of administrative discretion which will not be disturbed absent a clear showing that the determination was arbitrary or unreasonable. See *Contract Support Company*, B–184845, March 18, 1976, 76–1 CPD 184.

TM essentially contends that West's reliance on Government-furnished amplifiers and drawings cannot result in a product consistent with the requirements of the RFP, and that even "reverse engineering" cannot yield interchangeable equipment. TM specifically points out that West, in discussing electrical interchangeability in its revised offer, stated in part that "procurement of electrical parts will be compatible with the GFP, as assured by substitution"; TM argues that "compatible" equipment does not meet a requirement for "interchangeable" equipment.

However, in its report responsive to the protest, the Navy states:

> It is the opinion of this Command that West Electronics could meet the Navy's interchangeability requirement. The amplifiers to be produced are not technologically complex items. The only component that is unique to this particular amplifier is the transformer, and that item is available from other manufacturers. In fact, all the components of these amplifiers could be purchased, leaving the prime contractor with only an assembly function. This assembly could be completed by technicians experienced with this type of equipment.
>
> * * * The solicitation at issue does not require identicality of parts between the GFP and the amplifiers to be produced. The use of standard engineering practices with regard to tolerances would be sufficient to result in end items that meet the Navy's required level of interchangeability. The Navy also expects to furnish the successful offeror a copy of the drawings which TM Systems is to provide as a deliverable on the 1968 contract * * *. These drawings contain the tolerances of all components, and though the drawings would not have been verified, they should be useful to a contractor, even if provided only for informational purposes.
>
> Government technical personnel have determined that reverse engineering of the Government furnished equipment, along with the technical manual, is sufficient to produce an end item meeting the Navy's requirements. * * *

In addition, the Navy has determined that West is "technically responsible."

In view of the Navy's findings and judgment, we cannot say that the inclusion of West within the competitive range for the purpose of negotiations was unreasonable. The fact that TM does not agree with the Navy's evaluation does not invalidate it. See *System Innovation & Development Corp.*, B–185933, June 30, 1976, 76–1 CPD 426.

Based on the above, the protest is denied.

[B–187808]

Contracts—Discounts—Computation of Time Period—Inconsistent Provisions—Negotiated Terms and ASPR Provisions

When contract includes inconsistent provisions for computing discount period, specifically negotiated terms prevail over general Armed Services Procurement Regulation (ASPR) provision incorporated by reference.

Contracts—Discounts—Based on ASPR Provision—Not Offered or Accepted by Contractor

Government cannot properly claim discounts based upon ASPR provision which contractor neither offered nor accepted.

In the matter of TOTAL Leonard, Inc., January 26, 1977:

The Office of Planning and Financial Management, Defense Supply Agency Administrative Support Center (DSASC), requests our decision as to whether four discounts totaling $1,682.29, taken on payments for jet fuel, must be refunded to the supplier, TOTAL Leonard, Inc. (TOTAL).

During negotiations for Contract No. DSA600-75-D-0562, covering 34,500,000 gallons of jet fuel to be furnished during 1975 to the Defense Fuel Supply Center (DFSC), the contracting officer requested prompt payment discounts. By wire dated February 21, 1975, reconfirming an earlier offer, TOTAL computed the per-gallon cost to DFSC as $.30236 and specified the terms of sale as "1 percent discount if payment is received within 10 days from date of invoice."

The contract was awarded to TOTAL on February 24, 1975. DSASC's award wire read "Your offer * * * as amended by message dated February 21, 1975 * * * is hereby accepted. * * * Discount terms 1.00 percent, 10 days." The award wire also stated that Domestic Fuels Division's list of clauses dated October 21, 1974, would be included or incorporated by reference in the formal contract. Among these clauses is the following, which Armed Services Procurement Regulation (ASPR) § 7-103.14 (1975 ed.) requires to be included in all fixed-price supply contracts:

> In connection with any discount offered, *time will be computed* from date of delivery of the supplies to carrier when acceptance is at point of origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of these points, or *from the date the correct invoice or voucher is received in the office specified by the Government*, if the latter is later than date of delivery. *Payment is deemed to be made for the purpose of earning the discount on the date of mailing of the Government check.* [Italic supplied.]

Unaware of the negotiations between TOTAL and the contracting officer, DSASC's finance officer interpreted the contract in accordance with this provision until notified by TOTAL on March 13, 1975, that the discounts taken up to that date would not be allowed, since payments had not been received within 10 days as computed by TOTAL.

In an effort to resolve the conflict, the contracting officer sought an extension of the 10 days for receipt of payment. The record includes a March 27, 1975, wire from TOTAL, stating "We offer 1 percent discount if payment is received at our Alma, Michigan, office within 14 days of invoice date." The March 28, 1975, message returned by DSASC reads: "A prompt payment discount of 1.00 percent— 14 days is incorporated into this contract. The discount period begins on the date of the contractor's invoice and ends on the date of actual receipt of payment by the contractor."

Three of the discounts in question were taken prior to this March 28 amendment to the contract; one was taken after it. The pertinent dates and amounts are as follows:

	Invoice Number	Invoice Date	Date of Receipt	Date Paid and Dispatched	Amount of Discount
1.	342014	2/26/75	3/11/75	3/11/75	$495.94
2.	342015	2/26/75	3/ 4/75	3/11/75	$497.41
3.	343767	3/18/75	3/24/75	3/28/75	$246.99
4.	354870	7/10/75	7/14/75	7/22/75	$441.95
					$1682.29

Since there is no dispute as to the facts, the issue here is whether the discounts, all of which meet the time limits as computed by ASPR in that the Government checks were mailed within 10 days of receipt of the invoices, were properly taken. DSASC argues that the contracting officer exceeded his authority both in negotiating the contract on terms different from those prescribed by ASPR and in modifying the contract to the same effect. Therefore, DSASC argues, the discount period granted by TOTAL is illegal and unenforceable. The contractor, however, states that since more than 10 days, or in the one case more than 14 days, elapsed between date of invoice and receipt of payment, under terms of its contract the discounts are unearned. An identical discount period applies to all its customers, TOTAL states, permitting it to improve its cash flow sufficiently to justify the discounts.

We have here a contract which contains two different provisions as to how the discount period should be computed. Although DSASC's February 24, 1975, award wire is ambiguous in stating that discount terms are "1.00 percent, 10 days," it specifically refers to TOTAL's amended offer of February 21, 1975. We therefore assume that the contracting officer intended to accept TOTAL's terms of sale, which conflict with the discount provisions required by ASPR and incorporated by reference in the formal contract.

It is a general rule that when a contract contains conflicting provisions which cannot be reconciled, an attempt should be made to determine which of the provisions should be made effective, rejecting the other, in order to carry out the purpose and intention of the parties. According to Professor Corbin, if the apparent inconsistency is between a clause that is general and broadly inclusive in character and one which is more limited and specific, the latter "should generally be held to operate as a modification and pro tanto nullification of the former." 3 Corbin on Contracts § 547 (1960). Moreover, when provi-

sions which have been incorporated in a contract conflict with or are inconsistent with one inserted by the parties especially for the contract they are then making, the latter should prevail. "The result thus attained sustains the validity of the agreement; and it is believed to accord with the intention of the parties." *Id.* § 548; see generally, Restatement of the Law of Contracts 2d, Tentative Draft, § 229 (1973).

Applying this rule to the case of TOTAL results in a valid contract which includes the specifically negotiated clause allowing a 1 percent discount on payments received within 10 days from date of invoice. The inconsistent ASPR provision is considered nullified.

Moreover, even if DSASC is correct, and the contracting officer exceeded his authority by intentionally accepting a shorter discount period than that permitted by ASPR, we do not believe the effect of such action can be to impose the ASPR terms upon the contractor after performance. While the Government is not liable for unauthorized acts of its officers, agents, or employees, *Flippo Construction Co., Inc.*, B–182730, May 20, 1975, 75–1 CPD 303; *Harry L. Love & Associates*, 53 Comp. Gen. 620 (1974), 74–1 CPD 96, it cannot properly claim a discount based on ASPR provisions which the contractor neither offered nor accepted, particularly when there was no requirement that any discount be offered.

Accordingly, the discounts taken by the Government were not earned, and must be refunded as requested by TOTAL.

[B–73005]

Customs—Employees—Overtime Services—Reimbursement—Customs Service Inspectional Employees

Customs employee claims overtime pay under Customs overtime laws, 19 U.S.C. 267 and 1451 (1970), for work performed in addition to regular tour of duty and between the hours of 5 p.m. and 8 a.m. Employee is entitled to such compensation regardless of whether he first performed 8 hours of duty on the day claimed, and any contrary interpretation of the laws or the decision in *O'Rourke v. United States*, 109 Ct. Cl. 33 (1947), will not be followed.

In the matter of Donald Macnab—claim for overtime compensation, January 28, 1977:

This action is in response to the request for reconsideration of the settlement issued January 27, 1975, by our Transportation and Claims Division (now Claims Division) denying the claim of Mr. Donald Macnab for overtime compensation under sections 267 and 1451 of title 19, United States Code, while employed by the U.S. Customs Service, Department of the Treasury, as a Customs Inspector at Naco, Arizona.

Briefly stated, the record indicates that the employee worked an 8-hour shift from either 4 p.m. to midnight or midnight to 8 a.m. on 48 days during the period June 22, 1959, to June 24, 1963, which were his scheduled days off duty. This work was in excess of his basic 40-hour workweek, and he was compensated for this overtime duty under the provisions of the Federal Employees Pay Act of 1945, 5 U.S.C. 5541 *et seq.* (1970). Mr. Macnab claims that he should have been compensated for such duty under the provisions of the Customs overtime laws set forth in 19 U.S.C. 267 and 1451 (1970), and he seeks the difference between the overtime compensation actually received and the amount payable under sections 267 and 1451.

The Settlement Certificate of January 27, 1975, denied the claim on the ground that since the employee had not worked *more than* eight hours on the days claimed, and since none of the days fell on a Sunday or holiday, the employee was not entitled to overtime under the Customs overtime laws as interpreted in *United States* v. *Myers*, 320 U.S. 561 (1944), modified 321 U.S. 750 (1944), and *O'Rourke* v. *United States*, 109 Ct. Cl. 33 (1947). On appeal, the U.S. Customs Service argues that the Settlement Certificate has misinterpreted the *Myers* case and the the *O'Rourke* case incorrectly interprets the Customs overtime laws.

Sections 267 and 1451 of title 19, United States Code, provide, in part, that there shall be extra compensation for the overtime services of customs employees "who may be required to remain on duty between" 5 p.m. and 8 a.m., "or on Sundays or holidays." In *United States* v. *Myers*, *supra*, the United States Supreme Court addressed the question of whether such compensation is payable for *any* authorized duty rendered between 5 p.m. and 8 a.m., regardless of whether the duty is within the employee's regular duty hours; and the Court held, as noted in the settlement certificate:

> The legislative history of the various acts makes clear the intension of Congress to allow extra compensation only when there are overtime services in the sense of work hours in addition to the regular daily tour of duty without regard to the period within the twenty-four hours when the regular daily tour is performed.

In *O'Rourke* v. *United States*, *supra*, the Court of Claims considered whether a Deputy Collector of Customs stationed on a free public highway at the border between the United States and Canada was entitled to recover extra compensation under the Customs overtime laws. The Court in *O'Rourke* held that such an employee was entitled to such compensation as interpreted in *Myers* for work on Sundays and holidays and work "after a full day's work of eight hours." 109 Ct. Cl. 33, 41 (1947). The Court in *O'Rourke* held further that overtime work during weekdays was compensable at the special rate without regard to the hours such duty was performed. However, our Office has declined

to follow the *O'Rourke* case on this latter point, since we construe the statute as limiting payment of such compensation to overtime performed between 5 p.m. and 8 a.m. 27 Comp. Gen. 655 (1948); 27 *id.* 148 (1947); and 24 *id.* 140 (1944).

Our prior decisions have interpreted the Customs overtime laws and the *Myers* decision as holding that a customs employee who works between 5 p.m. and 8 a.m. in addition to his regular tour of duty may receive such additional compensation. See 49 Comp. Gen. 577 (1970); 27 *id.* 655, *supra;* 24 *id.* 140 *supra;* and 10 *id.* 487 (1931). Our decisions do not require that when an employee has worked his regular tour of duty and then performs additional duty between 5 p.m. and 8 a.m., he must first have performed 8 hours of duty that day before claiming overtime. See 16 Comp. Gen. 757 (1937).

As cited in our settlement certificate of January 27, 1975, the Court of Claims stated in the *O'Rourke* case that:

> The extra compensation to customs employees given by the Act of February 13, 1911 was based, not upon a 40-hour week, but, regardless of the length of the work week, upon work in excess of eight hours in any one day, or work on Sundays or holidays. 109 Ct. Cl. 33, 48, *supra.*

However, the context from which that language is taken pertains to whether additional pay received by the plaintiff under the War Overtime Pay Act of 1942 and based upon work in excess of 40 hours per administrative work-week would be setoff against pay received under the customs overtime laws. While it is not clear that the *O'Rourke* case stands for the principle that an employee must work more than 8 hours in any one day even if beyond his regular tour of duty in order to receive compensation under the Customs overtime laws, we decline to follow such an interpretation and the *O'Rourke* case to the extent it stands for that principle.

Accordingly, our prior determination regarding this claim is reversed, and a settlement will be issued in the amount found due.

[B–187116]

Equipment—Automatic Data Processing Systems—Computers—Distinctions—Firmware, Hardware and Software

Where request for proposals (RFP) established computer hardware requirement and successful offeror proposed "firmware," after technical review of issue, General Accounting Office (GAO) does not believe protester has substantiated its view that firmware is always classified as software, nor has protester clearly shown that agency's acceptance of firmware as being sufficient to fulfill hardware requirement lacks reasonable basis.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Equal Opportunity to Compete

Agency's acceptance of successful offeror's firmware as meeting RFP computer hardware specification may not have effected substantial change in Government's requirements. However, where RFP did not mention firmware and indicated that

Government's primary concern was obtaining acceptable computer at lowest price, GAO believes agency failed to maximize competition because it did not conduct meaningful discussions which would have advised protester that firmware approach might be acceptable and that protester's hardware approach was potentially excessive response to agency's needs.

Contracts—Negotiation—Requests for Proposals—Specification Requirements—Benchmark Periods

Despite agency's view that RFP provision requiring successful completion of computer benchmark in 8 hours was established as matter of Government's convenience and was not necessarily inflexible, in case where agency found it appropriate to allow one offeror almost 15 total hours in two benchmark sessions more than 3 months apart, GAO believes that RFP should have been amended to indicate that 8-hour requirement was flexible, and second offeror should have been allowed to revise proposal and have been accorded similar flexible treatment in benchmark of revised proposal's equipment configuration.

Contracts—Negotiation—Requests for Proposals—Specification Requirements—Benchmark Equipment

Waiving certain computer benchmark requirements and allowing substitutions of equipment in successful offeror's benchmark performance is not found to be objectionable in circumstances where waivers and substitutions (1) were believed necessary to maintain competition in procurement, (2) involved incidental, lower-performance equipment, and (3) did not affect offeror's obligation to furnish higher-performance equipment it had proposed and which agency had found to be technically acceptable.

Equipment—Automatic Data Processing Systems—Benchmarking—Acceptability—Administrative Determination

Where agency states that computer benchmark output was examined and found to be acceptable, protester's contradictory assertion that successful offeror's benchmark results were partially unacceptable does not establish that agency's account of facts is inaccurate.

Contracts—Negotiation—Offers or Proposals—Best and Final—Certification Omitted

Where agency required certification in best and final offers that equipment configuration proposed was that which had passed computer benchmark and had been determined to be technically acceptable, successful offeror's responses are viewed as meeting intent of requirement though certification as such was not provided.

In the matter of the Sperry Rand Corporation, January 31, 1977:

The Sperry Rand Corporation, acting through its Sperry Univac Federal Systems Division (hereinafter Sperry Univac), has protested the award of a contract to Systems Engineering Laboratories (SEL) under request for proposals (RFP) No. 5663, issued by the United States Geological Survey, Department of the Interior.

The RFP contemplated the award of a contract for a small computer system and ancillary items. The principal evaluation factor was total cost to the Government. Three offerors submitted proposals. Sperry Univac's and SEL's proposals were found to be in the competitive range. Negotiations were conducted, benchmark demonstra-

tions were held, and several rounds of revised proposals were submitted. In the final evaluation, SEL's lowest evaluated price (on a purchase basis) was $463,941.89 and Sperry Univac's lowest evaluated price (lease with option to purchase basis) was $1,008,755.56. Award was made to SEL.

The protester contends that SEL's proposal failed to meet several RFP hardware and software requirements, and that SEL's performance of the live test demonstration (benchmark) was not in accordance with the RFP. Sperry Univac believes that by accepting SEL's proposal in these circumstances, the agency waived certain of the RFP's provisions, and thereby made substantial changes in the Government's requirements--without complying with Federal Procurement Regulations § 1-3.805-1(d) (1964 ed. circ. 1), which requires that substantial changes be made by a written amendment to the RFP. Relying on the reasoning in such decisions as *University of New Orleans*, B-184194, January 14, 1976, 76-1 CPD 22, and *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144, Sperry Univac contends that the agency's actions deprived the Government of the benefit of maximum competition. Also, the protester contends that it was prejudiced, because had it known of the changes it coud possibly have offered one of its systems list-priced at $588,754 or one list-priced at $628,600, either of which, in the normal course of negotiations, would have placed it in a most competitive position in the procurement.

The agency believes that the protester's allegations are without merit. Its position, briefly stated, is that SEL's proposal was in compliance with the RFP, and that the actions of the contracting officer and other agency officials were proper and within their procurement discretion.

The treatment of the following issues is organized in this sequence: requirement(s) imposed on the offerors; summary of the protester's position; summary of the agency's position; and our resolution of the issue.

Hardware Requirement v. Firmware Proposal

RFP section 6.2.2b: "Hardware floating-point arithmetic is required with 7-digit minimum single-precision and 11-digit minimum double-precision capability."

Protester: Hardware floating point is a mandatory requirement. SEL offered "firmware." Firmware is software. It cannot be considered an acceptable substitute for the required hardware feature (in support of this, Sperry Univac has furnished an affidavit from its Director of Computer Sciences, a Ph.D. with an extensive background of professional qualifications and accomplishments in the computer field). By accepting SEL's firmware, the agency changed its requirements without issuing an amendment to the RFP which would have advised

Sperry Univac of the change and permitted it to compete on an equal basis.

Agency: Firmware floating point is not generally recognized in the industry as software. In the technical opinion of the agency, the firmware offered by SEL is functionally and generically hardware. SEL met the requirement.

Our review of this issue has included examination of the record by GAO staff members with a technical background in automatic data processing equipment. This technical review was not undertaken with the intent of evaluating SEL's proposal, since evaluation of proposals is the function of the contracting agency. Rather, our objective is to decide whether the agency's evaluation and conclusions are clearly shown to be without a reasonable basis. See *Julie Research Laboratories, Inc.*, 55 Comp. Gen. 374 (1975), 75-2 CPD 232.

It is our understanding that firmware is generally regarded as hard-wired software, and that it can be considered to be both hardware and software. In our opinion, Sperry Univac has not substantiated its viewpoint that firmware is always classified as software. Further, after examining the protester's submissions and SEL's proposal, we do not think that the protester has made a claim showing that the agency's acceptance of SEL's firmware as being sufficient to fulfill the hardware requirement has no reasonable basis to support it.

As to whether the agency was required to issue an amendment to the RFP to advise Sperry Univac that the agency's needs had changed from hardware to firmware, we think that a difficult question is presented. The protester cites decisions of our Office in support of its position, several of which are discussed in *Corbetta*, 55 Comp. Gen., *supra*, at pages 207-208. However, these decisions generally involved situations where RFP's established specific requirements for certain types of equipment, and the successful proposals offered items which were clearly different from what was called for. See, for example, *Instrumentation Marketing Corporation*, B-182347, January 28, 1975, 75-1 CPD 60, where the RFP called for brand name cameras with features such as magazine load and dual register pins, and the successful offeror's camera lacked several of the required features.

The present case is not nearly as clear-cut. We think that SEL's firmware has certain characteristics normally associated with hardware; also, the agency states that it considers the firmware to be compliant, in a functional sense, with the RFP hardware requirement. A strong case can be made, then, that acceptance of SEL's firmware did not involve a substantial change in the agency's requirements, but was merely a matter of technical judgment as to whether a particular offeror's technical approach met the requirements.

However, this analysis does not dispose of the issue. The real question, in our opinion, is whether the agency failed to maximize competition

by not conducting meaningful written or oral discussions--discussions which would have advised the protester that the hardware approach it had proposed was an excessive and costly response to a requirement which the agency had decided could be satisfied by a firmware approach.

In this connection, our Office has recognized that the requirement that the agency conduct meaningful discussions, including discussions of offerors' proposal deficiencies, may be properly limited by the need to preclude the "technical transfusion" of one offeror's innovative, ingenious technical approach to another offeror. See *Ocean Design Engineering Corporation*, 54 Comp. Gen. 363 (1974), 74-2 CPD 249; *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74-2 CPD 137; *Baganoff Associates, Inc.*, 54 Comp. Gen. 44 (1974), 74-2 CPD 56. However, such cases commonly involved cost reimbursement-type contract procurements in which the RFP stressed the need for innovative technical approaches by offerors.

The present procurement is on a fixed-price basis. Given acceptable technical proposals, the agency's primary concern would be obtaining the most advantageous price to the Government. The RFP required a hardware feature; it did not mention firmware. We see no basis on the record to conclude that SEL's offer of a firmware approach, as such, represented an ingenious, innovative technical approach to the agency's needs. When the agency decided that a firmware approach could be acceptable, we believe it, in effect, determined that Sperry Univac's hardware approach was weak or deficient in the sense that a hardware approach was a potentially excessive technical response to the agency's needs, involving excess cost. Accordingly, we believe that the agency erred in failing to advise Sperry Univac that a firmware approach might be considered acceptable and allowing Sperry Univac an opportunity to submit a revised proposal on that basis.

8-Hour Benchmark Period

RFP section 7.1: "The offeror will be given an 8-hour period during which the benchmark must be successfully run."

Protester: The agency waived this requirement for SEL. SEL ran its benchmark on two different occasions (October 28, 1975 and February 9, 1976), involving a total run time of 14 hours, 55 minutes. In contrast, Sperry Univac personnel were told at their benchmark that the 8-hour period was a firm requirement.

Agency: This is not a system requirement or a measure of computer efficiency. It was established for the Government's convenience and was designed to preclude exhaustive, marathon sessions of computer trials, failures, reruns, etc. The RFP did not prohibit a rerun of the benchmark. It was in the Government's best interest to allow

SEL to rerun part of its benchmark, because this preserved competition in the procurement.

We have difficulty with the agency's position. The agency cites decisions such as *Linolex Systems, Inc., et al.*, 53 Comp. Gen. 895 (1974), 74–1 CPD 296, and *Sycor Inc.*, B–180310, April 22, 1974, 74–1 CPD 207, which do recognize that flexibility in applying RFP benchmark requirements (insofar as such requirements relate to the technical acceptability of proposals) may be appropriate. However, the degree of flexibility exercised in this case goes considerably beyond what was involved in the cited decisions.

While the 8-hour benchmark period in this case may have been established for the Government's convenience, the degree of flexibility of its application—both with respect to the total number of benchmark hours and the time interval between benchmark runs—obviously has some bearing on the equipment configuration which offerors are willing to propose. An offeror having reason to believe that the requirement will be flexibly applied might be willing to propose a less efficient, less expensive system than it otherwise would. The RFP benchmark provisions are phrased in mandatory terms. They give little indication that the agency intended to apply them flexibly.

At the same time, we recognize that it would not be entirely accurate to conclude that the agency's application of the benchmark requirements was totally rigid insofar as the protester was concerned and flexible for SEL. A more serious question would be presented here if Sperry Univac's proposal had been rejected for failure to complete the benchmark within exactly 8 hours. This did not occur. The record indicates that Sperry Univac completed the test successfully and in the time remaining within the 8-hour period was given an opportunity to run a different system, even though that system had not been proposed as an alternate proposal. Again, if an alternate proposal had been submitted, a different question would be presented.

On balance, however, we believe that when the agency found it appropriate to flexibly apply the 8-hour requirement to SEL, to the extent that it did, it should have amended the RFP to give a clearer indication of the real nature of the 8-hour requirement, and allowed Sperry Univac an opportunity to make technical revisions to its initial proposal. If Sperry Univac had chosen to submit a revised technical proposal, the agency should then have proceeded to apply the benchmark requirements to Sperry Univac's revised proposal in a manner similar to the treatment given SEL.

Benchmark Equipment

RFP Amendment No. 1: "All hardware and software used in the performance of the [benchmark] must be included in the offeror's proposal."

RFP section 7.3: "The benchmark is to be run with the equipment the vendor proposes to deliver."

Protester: Some of the requirements were waived for SEL without Sperry Univac's knowledge. The agency waived the card punch requirement, allowed substituted equipment for the disk and operator's console, and allowed SEL to modify its printer. The agency claims that it was simply exercising its discretion as to judging the technical acceptability of proposals, but the decisions it cites (such as *Sycor, Inc., supra*) do not stand for the proposition that RFP requirements can be ignored under the guise of discretion in making technical judgements.

Agency: SEL's proposal included several items of equipment which it does not manufacture. To benchmark these items, SEL would have had to purchase or lease them in anticipation of being awarded the contract. There was concern that SEL might withdraw from the competition, leaving Sperry Univac (whose proposal was considered to be too expensive) as the only remaining offeror. It is not the agency's practice to waive benchmark requirements. However, in the special circumstances present in this case, the contracting officer decided to waive the requirements in regard to benchmarking the card punch and controller, which are items of minimum significance. In performing the benchmark, SEL was allowed to substitute some items (moving head disk and terminet) for those it had proposed, but care was taken to insure that the substituted items were of lower performance capability. Notwithstanding the waivers and substitutions in the benchmark, SEL is obligated under its contract to furnish the technically acceptable items it proposed and to benchmark these successfully during contract performance.

We agree with the protester that, as a general proposition, RFP benchmark requirements cannot simply be disregarded on the basis that an agency is making "technical judgments." However, the agency in this case was not relying solely on technical judgment, but on its procurement judgment as to the actions necessary to maintain a competitive environment. Also, after examining the record we are inclined to agree with the agency's view that the waivers and substitutions essentially involved incidental equipment only. Finally, even assuming for the purposes of argument that the agency erred in not issuing a written RFP amendment concerning benchmark waivers and substitutions, we have difficulty seeing how Sperry Univac was prejudiced. If similar latitude had been allowed Sperry Univac in running its benchmark, it is unclear to us how this would have enabled the protester to significantly improve its competitive position in the procurement--considering that it would still have been obligated (as is SEL) to furnish the equipment it actually proposed (and which the agency

had determined to be technically acceptable) under any resulting contract.

Benchmark Output

RFP section 7.3 required offerors to meet certain CPU times for compilation and execution of programs.

RFP section 7.4 required offerors to supply benchmark output data showing whether the requirements of section 7.3 were met.

Protester: The limited SEL output information in the agency's possession shows that SEL did not meet the compilation times for 3 of the 5 problems involved. The agency claims that SEL supplied all the required output, but that later it was apparently discarded; however, the agency acknowledges that it has retained all of Sperry Univac's output. Certain outputs were never furnished by SEL, as for example, the punched card output. Also, the agency admits that SEL's output for problem No. 5 was incomplete.

Agency: The output data which Sperry Univac contends shows that SEL failed to meet compilation times for 3 problems does not accurately reflect SEL's compilation timings; the actual relevant data, along with other output information, was not maintained in good order and apparently has been discarded. Existing documents do reflect the conclusion of the technical evaluation team chairman—who witnessed the SEL benchmark—that SEL's timings were acceptable. The RFP required that output data be "supplied"; SEL produced the required output, it was available for examination by the Government, and as such it was supplied. Sperry Univac shipped its output data to the agency, but this was not required by the RFP. The SEL output for problem No. 5 was off by 0.23 percent, which is not regarded as a significant discrepancy. In regard to the card punch, as already noted SEL did not benchmark the card punch it proposed; but the technical evaluation team did examine the technical specifications of the proposed card punch and judged that it met the RFP requirements.

This is essentially an issue of credibility. The agency states that its personnel observed the SEL benchmark, that SEL performed satisfactorily, and that the objective data which would further substantiate that fact is no longer available. Where the only evidence with respect to a disputed question of fact consists of contradictory assertions by the protester and the contracting agency, the protester has failed to carry the burden of affirmatively proving its allegations. *Telectro-Mek, Inc.*, B–185892, July 26, 1976, 76–2 CPD 81. To whatever extent protester's allegations may be taken as implying that agency personnel acted in less than good faith, considering the written record before us, which forms the basis for rendering decisions in bid protest cases, they must be regarded as merely speculative. *Julie Research Laboratories*, *supra.*

Certification in Best and Final Offer

Agency letter dated May 18, 1976: "[Proposals] must also contain a certification that the configuration of equipment which was used in the performance of the Live Test Demonstration and subsequently determined by the Government to meet the minimum requirements is that which is being offered."

Protester: The agency never received such a certification from SEL.

Agency: Failure to provide the certification was not viewed as sufficient cause to reject a proposal. The Government's technical evaluation team had certified that SEL successfully completed the benchmark test.

It appears to us that the purpose of this requirement was to insure that offerors in their best and final proposals were offering the same type of equipment which had been successfully demonstrated in the benchmark and determined by the agency to be technically acceptable.

Since some equipment waivers and substitutions had been allowed for SEL's performance of the benchmark, a certification by SEL that it was offering the same equipment used in its benchmark would not be what the agency was seeking. The agency would, however, want to be assured that SEL would be contractually obligated to furnish all of the equipment it offered in its proposal.

Under section 2.9 of the RFP, the contents of the successful offeror's proposal were to be considered as obligations of the contractor. Subsequent to the agency's May 18, 1976 letter, SEL submitted several letters and messages during the period from June 1 to June 18, 1976. These letters and messages make numerous revisions to SEL's proposed prices but do not appear to make any technical changes to the proposed equipment configuration. Also, the agency has stated that it considers SEL contractually obligated to provide the equipment it proposed. Under the circumstances, we think that SEL in effect certified that it was offering the equipment configuration which the agency had determined to be technically acceptable.

Conclusion

To the extent indicated above, Sperry Univac's protest is sustained. We believe that the agency's actions in the procurement did not afford to the Government the benefits of maximum competition. Based on the record before us, the question of the degree of prejudice experienced by the protester is more speculative; in our view, it is uncertain how much Sperry Univac would have improved its competitive position in the procurement if the agency had acted otherwise.

In any event, the current status of the procurement renders any recommendation for corrective action impracticable. In this regard, the agency's November 11, 1976, report to our Office estimated that if the protest were upheld, the Government would incur (as of that point

in time) a minimum of about $137,000 in additional costs (consisting of nonrecoverable agency expenses in connection with the SEL contract, termination for convenience settlement, and reprocurement costs). Undoubtedly the cost of corrective action at the present time would be greater; we understand that as of January 1977 the computer system was in the process of being installed. Accordingly, we see no basis to conclude that a recommendation for corrective action with respect to the award in this case would be in the Government's best interests.

However, by letter of today to the Secretary of the Interior, we are suggesting that our decision's conclusions with respect to the issues decided in the protester's favor be brought to the attention of the departmental personnel concerned with a view towards attempting to preclude a repetition of similar difficulties in future procurements.

[B–187978]

Subsistence—Per Diem—Military Personnel—Rates—Staying With Friends, Relatives, etc.

Military member who stayed with friends in lieu of staying in commercial lodging while on temporary duty assignment may not have cost of taking hosts to dinner included as actual lodging cost in computing his per diem allowance under paragraph M4205, Volume 1, Joint Travel Regulations, since payment for such expense was in the nature of a gift or gratuity and was not an actual cost of lodging.

In the matter of Captain Dene B. Stratton, USN, January 31, 1977:

This decision is in response to a request dated October 18, 1976, from F. D. Armstrong, Disbursing Officer, Navy Finance Center, Cleveland, Ohio, for an advance decision concerning the propriety of paying a claim for reimbursement for certain travel expenses of Captain Dene B. Stratton, USN, 553–32–3370. The Per Diem, Travel and Transportation Allowance Committee assigned the request PDTATAC No. 76–25 and forwarded it to this Office by endorsement dated December 1, 1976.

Captain Stratton was authorized per diem of $16 plus lodging, not to exceed $35 a day, during a temporary duty assignment in Denver, Colorado, during October 3 to 6, 1976. Captain Stratton elected to stay in the home of friends during the three nights for which lodgings were required, rather than to use commercial lodgings. Apparently, the friends did not charge Captain Stratton for staying in their home. However, feeling an obligation to repay his host's hospitality in some way, Captain Stratton took them to dinner. The cost of this dinner, $32.50, Captain Stratton claims as the actual cost of his lodging.

A Bureau of Naval Personnel endorsement included with the submission cites our decision B–183814, March 10, 1976, 55 Comp. Gen. 856, as possibly supporting allowance of the claim. That case involved the per diem allowance of a civilian employee who, while on temporary

duty, stayed in his son's neighbor's home and claimed as cost of lodging an amount he paid to the neighbor. The applicable regulation in that case, paragraph 1–7.3c Federal Travel Regulations (FPMR 101-7) (May 1973), contains no specific statement concerning reimbursement for the use of friends' or relatives' homes, rather than commercial lodgings, but states that agencies shall fix per diem for employees partly on the basis of the average amount the traveler pays for lodging. Under those regulations it was held in 55 Comp. Gen. 856, *supra*, that an employee could include as cost of lodgings a reasonable amount paid to friends or relatives for the use of their homes by the employee while on temporary duty assignments. That decision is consonant with a line of similar decisions, all involving civilian employees, allowing reimbursement of a reasonable amount in such circumstances, whether the lodgings allowance was authorized on a per diem basis or based on actual subsistence expenses. See 52 Comp. Gen. 78 (1972); B-184946, March 10, 1976; B-183583, February 2, 1976; B-182135, November 7, 1974, and cases cited therein.

In all of those cases the regulations authorizing lodging allowances contained no statements concerning reimbursement for the use of friends' or relatives' homes. In the instant case, however, the per diem allowance was authorized pursuant to paragraph M4205 (effective October 3, 1976) of Volume 1, Joint Travel Regulations (1 JTR) (change 286), which provides, in pertinent part:

> The per diem rate authorized in this paragraph is based on a combination of $16 for meals and incidentals plus the average cost of lodging. If the member uses no lodging during the temporary duty period *or utilizes lodging without cost, including as a guest of friends or relatives, then the average cost of lodgings is zero* and the per diem rate is $16. [Italic supplied.]

This provision was added effective June 1, 1976. Prior to that time per diem for military members was a set total amount for both meals and lodging, regardless of actual lodging expenses incurred. It was changed to its present form to provide for per diem computed on the basis of a set amount for meals and incidentals plus the average actual cost of lodgings, similar to the method used to determine the per diem allowances of civilian employees.

However, unlike the civilian cases cited above, this case does not involve reimbursing friends for the reasonable cost of using their home for lodging. Instead, it appears that Captain Stratton "utilized lodging without cost" as a guest of his friends. While he may have felt obliged to take his friends to dinner as an expression of appreciation for their hospitality, the dinner appears to have been in the nature of a personal gift or gratuity and cannot be considered as a "cost of lodging." Accordingly, in view of the specific provision of paragraph M4205, the $32.50 cost of the dinner Captain Stratton purchased for his friends may not be included as a cost of lodging in computing his per diem.

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